

1992

European Community and Eastern Europe: Deepening and Widening the Community Brand of Economic Federalism, The Symposium: Federalism for the New Europe

Roger J. Goebel

Fordham University School of Law, RGOEBEL@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [European Law Commons](#)

Recommended Citation

Roger J. Goebel, *European Community and Eastern Europe: Deepening and Widening the Community Brand of Economic Federalism, The Symposium: Federalism for the New Europe*, 1 New Eur. L. Rev. 163 (1992-1993)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/317

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE EUROPEAN COMMUNITY AND EASTERN EUROPE: "DEEPENING" AND "WIDENING" THE COMMUNITY BRAND OF ECONOMIC FEDERALISM

*Roger J. Goebel**

Introduction	163
I. The European Community as Viewed by the Court of Justice	168
II. The Scope of Community Action	175
III. Federal (or Supranational) Characteristics of the European Community	183
A. Legislative or Regulatory Powers	184
B. Executive or Administrative Authority	190
C. Judicial Authority	195
IV. Maastricht Treaty Modifications to the Community's Scope and Structure	200
A. The Scope of the European Union after Maastricht ..	202
B. The Institutional Structure after Maastricht	209
V. The Widening of the Community: Its Relations with Eastern Europe	213
A. Present Community Relations with Eastern Europe ..	214
B. The Europe Agreements	218
C. Medium Term Prospects: The EEA as a Model	223
D. Possible Accession of New Member States	228
Conclusion	236

INTRODUCTION

The purpose of this article is to analyze the federal character of the European Community¹ with particular reference to its relation to

* Professor of Law, Fordham University; B.A. 1957, Manhattan College; J.D. 1960, New York University. Professor Goebel has recently co-authored George A. Bermann, Roger J. Goebel, William J. Davey & Eleanor M. Fox, *Cases and Materials on European Community Law* (West 1993).

¹ As used in this article, the "European Community" refers to the institutional structure and system of law created principally by the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY or TREATY OF ROME]. The European states comprising the European Community are commonly referred to as Member States. The initial Member States were Italy, France, Federal Republic of Germany, Belgium, Luxembourg and the Netherlands. Denmark, Ireland and the United King-

the new democracies of central and eastern Europe. The reasons for this analysis are twofold.

First, the European Community (EC) may serve as a possible model for the Confederation of Independent States (CIS), which represents the majority of the former republics of the Soviet Union, or for the future relations between the Czech Republic and Slovakia, or between Croatia, Slovenia, and perhaps other republics of the former Yugoslavia. Recent events have made it less likely that these states will seriously envision the adoption of a federal system even in the looser form represented by the European Community but changes of circumstances later in this decade may make a federal system more suitable for them.

A stronger reason is that several of the central European states, notably the Czech Republic, Hungary, and Poland, are keenly interested in becoming members of the European Community at an indefinite date toward the end of this century. Of obvious importance are the consequences of accession to the European Community to these states in terms of loss of sovereignty on the one hand, and participation in the Community's governing structures on the other.

Whether the European Community should be characterized as a federal state is a sensitive political issue because the term "federal" immediately connotes a cession of sovereignty by the states to a central governing structure. During the process of drafting the Maastricht Treaty on European Union (TEU),² Germany and several other states wished to use the term "federal" in describing the Union. The United Kingdom vehemently opposed this, preventing the word "federal" from appearing in the text.

The current process of ratification of the Maastricht Treaty has

dom became Member States in 1973, Greece in 1981, and Portugal and Spain in 1986. Technically, the correct term is "European Communities" to take into account the two related treaties, the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 297 U.N.T.S. 167 [hereinafter EURATOM TREATY] and the earlier TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]. However, since the 1970s, the Community institutions themselves have habitually used the term "European Community," and it has become popular usage. The three treaties have been significantly amended on several occasions. The currently effective texts were published by the EC Commission in 1987 as the TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (1987). The EEC Treaty and other documents are reprinted in GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM A. DAVEY & ELEANOR M. FOX, *EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS* (1993).

² TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 [hereinafter Maastricht Treaty or TEU]. All of the Member States have signed the Maastricht Treaty, and as of this writing, it is in the process of ratification.

made it quite clear that a characterization of the European Community as a federal state, carrying the implication of a cession of sovereignty, has highly unfavorable emotional overtones. Ratification may be especially jeopardized if a referendum is involved. Consequently, proponents of the Maastricht Treaty in the politicized ratification process avoid any use of the word "federal." Indeed, the current popular slogan is "subsidiarity," a vague concept connoting the intent to reduce the power transfer in some fields from the Member States to the Community.³

Nonetheless, on an analytical basis, one can certainly maintain that the European Community does represent a type of federal union, already integrated economically and on the road to a greater level of political union. Although this was probably not the state of affairs at the outset of the Community in 1958, by the 1970s, perceptive observers realized that this was the case. Thus, Eric Stein, undoubtedly the leading American scholar specializing in Community law, very aptly characterized the Community in 1979 as "incipient federalism."⁴

When the Treaty of Rome⁵ was amended significantly in 1987 by the Single European Act (SEA),⁶ the federal character of the Community became more pronounced, as we shall see in Parts Two and Three hereafter. The Preamble to the SEA refers to the intent "to transform the whole complex of relations between their States into a European Union,"⁷ picking up the term used by the European Council in its 1983 Solemn Declaration on European Union.⁸ The Maas-

³ Added by art. 3b of the TEU. See *infra* note 193 and accompanying text.

⁴ Eric Stein, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy*, 127 U. PA. L. REV. 897, 901 (1979).

⁵ *Supra* note 1.

⁶ SINGLE EUROPEAN ACT, Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter SEA] represents the most substantial amendments to the TREATY OF ROME to date. The revisions made by it were incorporated into the EEC and other treaties in the consolidated text published by the Commission. *Supra* note 1. The SEA has been the subject of extensive commentary. Among the helpful articles are George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989); Claus-Dieter Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987); Hans-Joachim Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 FORDHAM INT'L L.J. 446 (1987); Michel Waelbroeck, *The Role of the Court of Justice in the Implementation of the Single European Act*, 11 MICH. J. INT'L L. 671 (1990).

⁷ SEA, *supra* note 6, at 2.

⁸ E. C. Bull. 1983/6, at 24. Issued by the European Council at Stuttgart on June 19, 1983. The European Council is composed of the Heads of State and Government of the Member States and, as such, represents the highest political policy-makers in the Community. The European Council has met on a regular basis two or three times a year since 1972 in order to deal with major political disputes and to shape long-term Community policy. Title I of the

tricht Treaty's formal title, Treaty on European Union, itself indicates that it is intended to create, at least in part, such a union. If, as is likely but not absolutely certain, the Maastricht Treaty is ratified, the term "European Union" will be used to describe the structural relations between the Member States.⁹ The European Community will continue to be the core of such a European Union.¹⁰ Part Four of this article will describe the manner in which features of the proposed European Union, and new aspects of the European Community, will augment the federal characteristics of the Community.

Although most authoritative commentators¹¹ continue to refrain from describing the European Community as federal, the term seems appropriate. The leading scholar to employ it is Professor Koen Lenaerts, now a judge of the Court of First Instance in Luxembourg, who in his extremely perceptive article, "Constitutionalism and the Many Faces of Federalism," states that "[f]ederalism is present whenever a divided sovereignty is guaranteed by the national or supranational constitution and umpired by the supreme court of the common legal order."¹² After a detailed analysis, Professor Lenaerts concludes

SEA formalized the European Council structure. The Solemn Declaration on European Union is one of the most important policy declarations of the European Council, affirming a commitment to take concrete steps toward a European Union.

⁹ TEU, *supra* note 2, arts. A-F and J-P.

¹⁰ The TEU, Article G, contains all the amendments to be made to the EEC Treaty. Article G(A) indicates that the term "European Community" is to replace "European Economic Community." *Id.*

¹¹ Many excellent texts describe and analyze the institutional and constitutional structure of the Community. *See generally*, P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (L. Gormley ed., 2d ed. 1989) [hereinafter KAPTEYN & VERLOREN VAN THEMAAT]; T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (2d ed. 1988) [hereinafter HARTLEY]; D. LASOK & J. W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (4th ed. 1987); P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (5th ed. 1990) [hereinafter MATHIJSEN]; HENRY G. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (4th ed. 1976) [hereinafter SCHERMERS]. For a modern casebook treatment *see* GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW (1993) [hereinafter BERMAN, GOEBEL, DAVEY & FOX].

¹² Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 263 (1990). Professor Lenaerts contrasts federalism in the European Community with the federal systems of a number of other states. For a broader view of constitutional structure and the role of the Court of Justice in the Community, *see* KOENRAAD LENAERTS, LE JUGE ET LA CONSTITUTION AUX ETATS-UNIS D'AMÉRIQUE ET DANS L'ORDRE JURIDIQUE EUROPÉEN (1988). Valuable recent constitutional studies of the Community include Ulrich Everling, *Reflections on the Structure of the European Union*, 29 COMMON MKT. L. REV. 1053 (1992); Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229 (1986); Mackenzie Stuart, *Problems of*

that the European Community is indeed a type of a federal system, an "integrative federalism."

The term federal does not admit of a precise definition, due in part to the desire of certain commentators to employ it with a specific content: either to be able to describe a particular country or countries as federal, or to describe a country or countries as definitely not falling within that descriptive term. For the purpose of this essay, I will provide a personal definition. A federal system is one in which: 1) a constitution, or other constitutive document or documents, is, or are, generally recognized to delineate the powers of a political structure, as opposed to those of several separate constitutive states; 2) the constitutive states transfer some of their sovereignty, either irrevocably or in a manner difficult of revocation, to the central political structure; and 3) the central structure exercises a substantial degree of legislative or regulatory, executive or administrative, and judicial or quasi-judicial authority.

Those who object to the term federal in describing the European Community may be content to accept "supranational." As will be evident from the following discussion, all of the present Member States accept that the Community has the supranational characteristics set out in the preceding paragraph.

This article consists of five parts. In Part I, the Court of Justice's constitutional doctrines describing the supranational character of the Community will be presented. Parts II and III will outline and analyze the Community's scope of action and its institutional structure, both as originally conceived and as modified by its history, notably by the SEA. Part IV will review and analyze the most important changes affecting the Community's scope and structure that would occur if, as presently expected, the Maastricht Treaty is ratified.

Part V, the longest portion of the article, concentrates on the issues posed in the "widening" of the Community, both with regard to the east and central European states and with respect to the European Free Trade Association (EFTA) states. Part V will describe the present trade and aid relations between the Community and eastern Europe, the impact of the new European Economic Area (EEA), and then reflect on the issues involved in the admission of EFTA and east

the European Community - Transatlantic Parallels, 36 INT'L & COMP. L. Q. 183 (1987); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989); John Temple Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455 (1991); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

European states to the Community. (Readers who already well understand the present constitutional structure of the Community may prefer to glance only briefly at Parts I to III, concentrating on the more novel material provided in Parts IV and V.)

I. THE EUROPEAN COMMUNITY AS VIEWED BY THE COURT OF JUSTICE

Lawyers tend to have a marked deference for what courts have to say, especially supreme courts. The Court of Justice of the European Community has the role of interpreting and applying the EEC Treaty and, as such, speaks with final authority on defining the nature and scope of the Community. It is accordingly sensible to begin by observing what the Court of Justice has said in describing the constitutional character of the Community. This is all the more sensible as a starting point because the Court's decisions have not only substantially influenced the general perception of the Community's character, but have themselves contributed to shaping the constitutional nature of the Community.

As early as 1963, the Court of Justice held in the landmark *Van Gend en Loos*¹³ case that the Community was not a mere organization of states created by an ordinary treaty subject to public international law.¹⁴ Rather, the Court conceived the Community as representing a "new legal order" transcending public international law principles, a "legal order" which clearly implied a sovereign or quasi-sovereign central structure. The Court notably gave the following description: "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields . . ."¹⁵

Although the term "new legal order" implies the existence of a federal system, the Court refrained from using the word federal, no doubt because of the emotional overtones of the word. Indeed, the

¹³ Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 [hereinafter, *Van Gend en Loos*]. This and other principal cases discussed in this section are excerpted and analyzed in BERMAN, GOEBEL, DAVEY & FOX, *supra* note 11, chs. 4-6.

¹⁴ The Court likewise rejected the contention, advanced by Member States, that the EEC Treaty should be interpreted in the light of public international principles, and held that it constituted a "new legal order," binding the Member States to its own internal rules. Cases 90 and 91/63, *Commission v. Luxembourg and Belgium*, 1964 E.C.R. 625 (milk products); Case 38/69, *Commission v. Italy*, 1970 E.C.R. 47 (lead and zinc).

¹⁵ *Van Gend en Loos*, *supra* note 13, at 12.

Treaty articles on free movement of goods,²⁰ free movement of workers,²¹ the right of establishment for business or professional purpose,²² and the right to provide commercial, financial, professional, or other services.²³

Ranking in importance with the direct effect doctrine is that of the primacy of Community law over national law. The EEC Treaty does not contain a supremacy clause: no clear textual statement exists, as it does in the Constitution of the United States, which makes the Constitution and federal law supreme over state law. As a result, early in Community history the Court of Justice had to decide whether the EEC Treaty should prevail over contrary, subsequent national law.

In 1964, in the landmark case, *Costa v. ENEL*,²⁴ the Court of Justice enunciated the doctrine of Treaty primacy. The Court's language is so striking that it merits a lengthy quotation:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

* * *

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.²⁵

In *Costa v. ENEL*, the Court concluded that Italian courts must review an Italian law nationalizing certain electrical utilities to determine whether the law fully complied with obligations created by certain specific EEC Treaty provisions. The Court's elaboration of the

²⁰ Case 74/76, *Ianelli & Volpi S.p.A. v. Meroni*, 1977 E.C.R. 557 (involving article 30); Case 83/78, *Pigs Mktg. Bd. v. Redmond*, 1978 E.C.R. 2347 (involving article 34).

²¹ Case 167/73, *Commission v. France*, 1974 E.C.R. 359 (an article 48 case involving French merchant seamen); Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337 (involving article 48(3)).

²² Case 2/74, *Reyners v. Belgium*, 1974 E.C.R. 631 (involving article 52).

²³ Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging*, 1974 E.C.R. 1299 (involving article 59).

²⁴ Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, 1964 E.C.R. 585.

²⁵ *Id.* at 593-94.

Court has never used the word "federal," although the phrase the "new legal order" has become its classic depiction of the Community.

The Court's perception of the Community as such a "new legal order" enabled it to develop a highly important principle of Community law in *Van Gend en Loos*, called the "direct effect" doctrine. The ultimate issue in the case was whether a private party could enforce against a Member State obligations imposed by the EEC Treaty.¹⁶ The EEC Commission has the power to sue Member States in the Court of Justice for violations of Treaty obligations, making use of Article 169,¹⁷ but the EEC Treaty is silent as to the rights of private parties in this regard.

Nonetheless, the Court held that the language of certain EEC Treaty articles is so precise, absolute, and unconditional that individuals may claim rights based upon these articles as "rights which become part of their legal heritage."¹⁸ Consequently, individuals and enterprises may assert such Treaty-based rights against Member States in the national court systems. Such Treaty articles are said to have "direct effect" within the national legal systems.¹⁹

In later cases, the Court of Justice has continued to hold that a large number of EEC Treaty articles have direct effect so as to create rights for individuals, natural persons or legal entities, which are enforceable by national courts against Member States. Thus, individuals can claim concrete and important applications of rights under the

¹⁶ The Netherlands government had reorganized its categories of tariffs, increasing duties on certain items, presumably in violation of Article 12 of the EEC Treaty, which forbids any raising of duties above 1958 levels. A freight transporter required to pay the higher duties had sued for a refund in a Dutch tariff tribunal. *Id.*

¹⁷ Article 169 permits the Commission to sue Member States as a recourse against their violations of the Treaty or any obligations arising under it. EEC TREATY, *supra* note 1, art. 169. The Court adjudicates the matter and Member States must respect the Court judgment. *Id.* art. 171. Article 169 proceedings are one of the most powerful weapons to ensure Member State compliance with the Treaty. The Commission frequently brings Article 169 proceedings and is successful in most cases. Alan Dashwood & Robin White, *Enforcement Actions under Articles 169 and 170 EEC*, 14 EUR. L. REV. 388 (1989) [hereinafter Dashwood & White, *Enforcement Actions*]. In *Van Gend en Loos*, the Netherlands argued that Article 169 represented the sole remedy for Member State violations and implicitly ruled out private party actions as a remedy. *Van Gend en Loos*, *supra* note 13, at 6.

¹⁸ *Van Gend en Loos*, *supra* note 13, at 12.

¹⁹ See generally Gerhard Bebr, *Directly Applicable Provisions of Community Law: The Development of a Community Concept*, 19 INT'L & COMP. L.Q. 257 (1970); Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983). See also the discussions of the direct effect doctrine in each of the texts cited *supra* note 11.

primacy doctrine was all the more striking in that the Italian Constitutional Court had reached the opposite conclusion in an earlier related proceeding, namely, that the Italian nationalization law should prevail over the EEC Treaty.²⁶

In the years since *Costa v. ENEL*, the Court of Justice has reaffirmed and further developed its primacy doctrine. Perhaps the most important case was *Internationale Handelsgesellschaft (IHG)*,²⁷ involving the interplay between a Community agricultural regulation and German constitutional provisions protecting basic rights. The Court forcefully held that Community rules, based on the EEC Treaty, had primacy even over a national constitution and constitutionally based rights. "[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."²⁸

Such a primacy doctrine obviously creates the risk that basic rights might not be respected. In order to avert this result, the Court of Justice read a doctrine of respect for basic rights into the EEC Treaty, which has no express catalog of basic rights, and further declared that the Court itself would be the guarantor of basic rights. The Court derived this doctrine from its basic function under the Treaty to ensure respect for the law.

[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.²⁹

In a number of subsequent decisions, the Court has developed its conception of the nature and extent of the implied basic rights that are to be applied when interpreting the Treaty or Community rules.

²⁶ The Italian Constitutional Court ruling is discussed in the opinion by Advocate General Lagrange. *Id.* at 605-06. (Advocates General are a special type of judges who form part of the Court of Justice. They provide an initial advisory opinion before the Court of Justice decides a case and renders its judgment. Although advisory, the Advocate Generals' opinions often influence the judgment and later case law.) Subsequently, the Italian Constitutional Court generally accepted the position of the Court of Justice. Case 183, *Frontini v. Ministero delle Finanze*, 1974 *Il Foro It.* 314, 2 C.M.L.R. 372 (1973).

²⁷ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125.

²⁸ *Id.* at 1134.

²⁹ *Id.*

Although the Court has usually been concerned with the protection of economic rights,³⁰ as in the *IHG* case, it has also had occasion to deal with rights of the person, such as the right of privacy or freedom of speech.³¹ Increasingly, it has recognized procedural rights, including the right to a fair hearing, right of appeal, right of confidential communications with attorneys, and the privilege against self-incrimination.³²

Obviously, national courts and legal systems have difficulty in accepting the primacy doctrine, especially in the absence of an express supremacy clause in the Treaty. It has particularly been difficult for national courts to accept the primacy of Community law over the national constitutional protection of rights. Gradually, however, national courts have come to accept the Court's primacy doctrine, although in some instances they have expressed concerns as to whether the Court of Justice will in all cases sufficiently protect basic rights.³³

The United Kingdom has posed a unique problem, because of its lack of a written constitution. Two important elements of its unwritten constitution are the principles that one Parliament cannot bind a later Parliament, and that a court cannot restrain the effectiveness of an act of Parliament. The 1989 *Factortame* case involved the interplay between these principles and the doctrine of Treaty primacy.³⁴

In 1988, Parliament amended the Merchant Shipping Act to protect UK fishing interests. The Act contained provisions that, on their

³⁰ Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727 (right of property use and right of professional economic operations); Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491 (right of property use).

³¹ Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419 (right of privacy); Case C-100/88, *Oyowe and Traore v. Commission*, 1989 E.C.R. 4285 (freedom of expression); Case 130/75, *Prais v. Council*, 1976 E.C.R. 1589 (right of non-discrimination based on religion).

³² Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219 (right to a hearing and appeal for migrant workers); Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227 (right of hearing and appeal for importers in free movement of goods cases, in this case, German beer); Case 155/79, *AM&S Europe Ltd. v. Commission*, 1982 E.C.R. 1575 (privilege of confidential communications with attorneys); Case 374/87, *Orkem v. Commission*, 1989 E.C.R. 3283 (privilege against self-incrimination).

³³ *Minister for Economic Affairs v. S.A. Fromagerie Franco-Suisse "Le Ski,"* [1972] C.M.L.R. 330, at 352 (Belgian Supreme Court); *Administration des Douanes v. Societe Cafes Jacques Vabre*, [1975] 2 C.M.L.R. 336 (French Supreme Court); *In re Application of Wunsche Handelsgesellschaft*, [1986] 3 C.M.L.R. 225 (German Constitutional Court); Case 170/84, *S.p.a Granital v. Amministrazione delle Finanze dello Stato*, 1984 Il Foro It. 2062, 21 COMMON MKT L. REV. 756 (1984) (Italian Constitutional Court).

³⁴ Case C-213/89, *The Queen v. Secretary of State for Transp., ex parte: Factortame Ltd. and Others*, 1990 E.C.R. I-2433.

face, appeared to violate EEC Treaty rights of commercial establishment. When private parties representing Spanish fishing interests sued in a UK court to restrain the operation of the 1988 Act, the issue was whether a British court could defy the unwritten constitutional tradition and restrain an act of Parliament. The Court of Justice held that the British court, like any other national court, had an obligation to enforce Community law against any contrary national provision, and must restrain the operation of the national law.³⁵ When the House of Lords acquiesced to the Court's conclusion, the doctrine of primacy of Community law received forceful application in the UK.³⁶

The application of the doctrine of Treaty primacy is not limited to occasional or rare cases. This is because the doctrine implies a corollary, well-known in American constitutional terms as the preemption of state law by federal law. Substantial use has been made of the doctrine that the EEC Treaty, or secondary legislation, preempts a field of national legislative or regulatory action, or requires national rules to be applied in consonance with Community rules.³⁷

The Court's initial statement of the preemption doctrine came in a 1969 case, *Walt Wilhelm v. Bundeskartellamt*.³⁸ It held that Germany's enforcement of its competition rules must be compatible with "the uniform application throughout the Common Market of the Community rules" on competition.³⁹ The preemption doctrine has also often been applied with regard to the Community's agricultural policies.⁴⁰ However, the preemption doctrine's greatest importance presently results from the broad program of Community harmonization of national rules in the fields of health and safety regulation, technical standards, environmental and consumer protection, and

³⁵ In a subsequent proceeding, the Court of Justice held that several provisions of the 1988 amendments to the Merchant Shipping Act did indeed violate the Treaty articles on right of commercial establishment. Case C-221/89, *The Queen v. Secretary of State for Transp. ex parte Factortame Ltd.*, [1991] 3 C.M.L.R. 589.

³⁶ The opinion of Lord Bridge of Harwich was particularly clear in recognizing that the supremacy of Community law was well established before the United Kingdom joined the Community, and hence British courts had a duty to follow Community law principles even when in conflict with a rule of UK law. Case C-213/89, *Factortame Ltd. and Others v. Secretary of State for Transp.*, [1991] 1 All E.R. 70, 3 C.M.L.R. 375 (1990).

³⁷ For an excellent review of the Community doctrine of preemption, see Eugene D. Cross, *Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis*, 29 COMMON MKT. L. REV. 447 (1992).

³⁸ Case 14/68, *Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1.

³⁹ *Id.* at 14.

⁴⁰ *Pigs Mktg. Bd.*, *supra* note 20.

commercial and financial law. A leading 1979 decision⁴¹ held that when the Community has totally harmonized a particular field of action, Member State rules must strictly follow the Community rules, and cannot be more or less restrictive, or different in any significant way.

The Court of Justice has recently had another occasion to articulate its view of the fundamental nature of the European Community and the legal system which it represents. In 1991, the EC Commission requested a binding opinion of the Court to review the terms of the proposed European Economic Area (EEA) Agreement with the European Free Trade Association (EFTA) states.⁴² The Court held that certain provisions of the draft EEA Agreement were incompatible with the EEC Treaty largely because of its view of the nature of the Community:

[T]he EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, *Van Gend en Loos*). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.⁴³

The *EEA Agreement* decision serves in some measure as a summary of the Court's views. The Court does not hesitate to characterize the EEC Treaty as a constitutional charter. It continues to regard the Community as one in which participation in central governing bodies is accorded to Member States in return for their cession of sovereignty in certain stated fields of action. The Court treats the doctrines of primacy of Community law and the direct effect of certain Treaty articles as fundamental to the Community legal system.

⁴¹ Case 148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629. *Accord*, Case 60/86, *Commission v. United Kingdom*, 1988 E.C.R. 3921 (dim-dip lighting); Case C-150/88, *KG in Firma Eau de Cologne & Parfümerie-Fabrik Glockengasse No. 4711 v. Provide SRL*, 1989 E.C.R. 3891; Case 88/79, *Ministère Public v. Grunert*, 1980 E.C.R. 1827.

⁴² The EEA agreement is described in Part Five C *infra*.

⁴³ Opinion 1/91, *European Economic Area*, 1991 E.C.R. — (not yet reported) (Dec. 14, 1991), at ¶ 21, [1992] 1 C.M.L.R. 245, at 269, noted by Henry Schermers in 29 COMMON MKT. L. REV. 991 (1992) [hereinafter Opinion 1/91].

Although the term "federal" is not employed, the Court's vision of the European Community accords well with the analytical model of a federal system set forth as the author's personal definition in the introduction. First, the EEC Treaty serves as the constitutional charter, supplemented by basic rights implied, defined, and protected by the Court. Second, the Member States have transferred partial sovereignty to the central political institutions, the Commission, the Council, the Parliament and the Court of Justice. The Court has described this transfer of sovereignty as "permanent." Third, the central Community political institutions exercise substantial legislative, administrative, and judicial power, whose impact is enhanced by the Court's doctrine that the Treaty, and laws and rules pursuant to it, have primacy over, and may preempt, national law.

Whether or not one agrees that the Court's view of the Community can be labelled as "federalist," there is no question but that the Court sees the Community as a central structure exercising substantial supranational powers in which the Member States participate, but only at the price of a cession of part of their sovereignty.

II. THE SCOPE OF COMMUNITY ACTION

Before describing the political structure of the European Community, it is imperative to indicate the scope of its field of action. An otherwise impressive transfer of political governance from constitutive states to a central polity is reduced greatly in importance if the field of action of the central polity is narrowly restricted.

The use of the word "economic" to modify "Community" in the phrase, the European Economic Community, immediately suggests an intention of the Community's founders to restrict it to economic fields of action, leaving political and foreign affairs outside of the scope of the Community. (The TEU's proposed removal of the word "economic" as a modifier thus shows a fundamental shift in attitude.)⁴⁴ However, the founders certainly intended the Community to have far-reaching power within specific economic spheres. The EEC Treaty's purpose clause, Article 2, set as its goal the creation of a "common market," a term with broad implications. The Community was never conceived to be limited in scope to be a free-trade zone or a free investment and mutual developmental assistance pact, as for example, the European Free Trade Association or the proposed North American Free Trade Association (NAFTA).

⁴⁴ TEU, *supra* note 2, art. G(A).

Moreover, during the course of its history the Community has steadily expanded its fields of action. This has been achieved through the deliberately expansive interpretation of the extent of the listed fields of action in Article 3 of the EEC Treaty by the Commission, the Council, and the Court of Justice, as well as by the use of the "implied powers" or "elastic" clause, Article 235, which permits the Council to take action, by unanimous vote, to further the common market when no particular Treaty article specifically authorizes the action.⁴⁵

Finally, the Single European Act's 1987 amendments added new spheres of action and, more importantly, intensified the process of legislative activity by setting the goal of achieving a complete internal market by December 31, 1992.⁴⁶ The internal market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured . . ."⁴⁷

More specifically, Article 3 of the EEC Treaty sets forth a series of fields of action for the Community. The first field of action is the creation of a common customs system and a Common Commercial Policy (CCP).⁴⁸ Other Treaty articles spell out the extent of this CCP,⁴⁹ and specify that the Commission represents the Community in the General Agreement on Trade and Tariffs (GATT) structure.⁵⁰ In fact, over the years, the Community has almost totally supplanted the Member States in external trade and investment policy. This development is largely due to Court of Justice decisions that have held that the Community has implied external relations powers corresponding to fields of internal Community action, and which have concluded that in certain fields of external relations, the Community has exclusive competence.⁵¹

⁴⁵ *Id.* art. 235. The Council can act by unanimous vote, on the basis of a Commission proposal and after consultation of the Parliament, whenever necessary to attain an objective of the Community or the EEC Treaty. *Id.* For discussion of the role and use of Article 235, see KAPTEYN & VERLOREN VAN THEMATAAT, *supra* note 11, at 113-17.

⁴⁶ SEA, *supra* note 6, art. 13 amending EEC TREATY, *supra* note 1, art. 8a ¶ 2.

⁴⁷ SEA, *supra* note 6, art. 13.

⁴⁸ EEC TREATY, *supra* note 1, art. 3(b).

⁴⁹ *Id.* arts. 110-16.

⁵⁰ *Id.* art. 229.

⁵¹ The leading decisions are: Case 22/70, *Commission v. Council (ERTA)*, 1971 E.C.R. 263; *Opinion 1/75, Local Costs Standard*, 1975 E.C.R. 1355; *Opinion 1/78, International Agreement on Natural Rubber*, 1979 E.C.R. 2871. The development of the Community's external relations power and its Common Commercial Policy is analyzed in BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, chs. 26-27. See also William Rawlinson, *An Overview of EEC Trade with Non-Community Countries and the Law Governing These External Agreements*, 13 FORDHAM INT'L L.J. 208 (1989-90).

Undoubtedly, the most fundamental sphere of Community action in creating the common market is the achievement of the "four fundamental freedoms," the free movement of goods, services, persons, and capital.⁵² Since the SEA, the four fundamental freedoms have been identified as the constituent features of the internal market. Beginning with framework programs for legislative action in the 1960-62 period, the Community has steadily developed a system of harmonization of Member States laws in order to break down direct or indirect national barriers to trade. The earlier Community legislative measures only eliminated discriminatory national barriers, but legislation since the 1970s has created Community-wide standards for the regulation of specific commercial, financial, fiscal, professional, and technical fields.⁵³

The Commission's famous program for legislative action, the White Paper on Completing the Internal Market,⁵⁴ gave impetus to the harmonization of laws' process. The White Paper identified sectors in which progress had been limited or virtually non-existent, such as financial market regulation, public procurement, professional activities, internal tax harmonization and the creation of European-wide-intellectual property rights, and called for specific measures to achieve the internal market in these sectors. The Single European Act set the date of December 31, 1992 as the terminal date for achieving the internal market⁵⁵ and facilitated the legislative process to achieve it.⁵⁶

The goal of attaining the internal market has now largely been completed.⁵⁷ As of the end of 1992, the Community has adopted hun-

⁵² EEC TREATY, *supra* note 1, arts. 3(a) and (c).

⁵³ For a description and analytic review of the Community's internal market legislative program, see BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, chs. 9-17; MARK BREALEY & CONOR QUIGLEY, *COMPLETING THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY* (1989); DOMINIK LASOK, *THE PROFESSIONS AND SERVICES IN THE EUROPEAN ECONOMIC COMMUNITY* (1986); NICHOLAS GREEN, TREVOR HARTLEY & JOHN USHER, *THE LEGAL FOUNDATIONS OF THE SINGLE EUROPEAN MARKET* (1991); KAPTEYN & VERLOREN VAN THEMATAAT, *supra* note 11; DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* (3d ed. 1992).

⁵⁴ *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85)310 final [hereinafter White Paper]. Principal credit for the authorship of the White Paper is usually given to Commission President Jacques Delors and the Commissioner then in charge of the Internal Market Directorate General III, Lord Cockfield. The White Paper was prepared as an agenda for Community action on the basis of a request made by the European Council meeting in Brussels, March 29-30, 1985.

⁵⁵ SEA, *supra* note 6, art. 8a.

⁵⁶ *Id.* art. 100a.

⁵⁷ COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH GENERAL REPORT OF THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1991, § 2, ¶ 79 (1992) [hereinafter XXVTH

dreds of legislative harmonization measures, many of great economic importance. The best known are those relating to the integrated financial market, specifically, the directives intended to harmonize aspects of company, securities, accounting, banking, and insurance law.⁵⁸ Other prominent measures have harmonized features of the value added tax system,⁵⁹ the mutual recognition of higher education diplomas for access to professions,⁶⁰ and certain types of intellectual property rights.⁶¹ While legislative and regulatory implementation by the Member States has lagged behind, and probably will not be completed until the end of 1993 or even 1994, the internal market program of the Community has been a virtually unqualified success.

Moreover, the legislative pursuit of the four freedoms has been supplemented by Court of Justice decisions that unequivocally strike down Member State measures that discriminate against or unreasonably restrict intra-Community trade in goods or services, or limit the free movement of workers, professionals, and students, or restrict the right of commercial or professional establishment.⁶² Similarly, the

GENERAL REPORT]. Eighty-five percent of the White Paper legislative program had been adopted by the end of 1991. *Id.* Considerable efforts have been made by the Council and Parliament to complete most of the remaining legislative agenda before the end of 1992 or early in 1993. *Id.*

⁵⁸ The academic literature is extensive. T.E. Cooke, *The Seventh Directive - An Accountant's Perspective*, 9 EUR. L. REV. 143 (1984); Michael Gruson & Wolfgang Feuring, *The New Banking Law of the European Economic Community*, 25 INT'L LAW. 1 (1991); Klaus J. Hopt, *The European Insider Dealing Directive*, 27 COMMON MKT. L. REV. 51 (1990); Annetje Ottow, *An Internal Insurance Market Before the Turn of the Century?*, 29 COMMON MKT. L. REV. 511 (1992); Jane Louise Powell, 1992: *Single European Market Implications for the Insurance Sector*, 13 B. C. INT'L & COMP. L. REV. 371 (1990); Robert Strivens, *The Liberalization of Banking Services in the Community*, 29 COMMON MKT. L. REV. 283 (1992); Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185 (1990); George S. Zavvos, *Banking Integration and 1992: Legal Issues and Policy Implications*, 31 HARV. INT'L L.J. 463 (1990).

⁵⁹ Council Directive 91/680, 1991 O.J. (L 376) 1; Council Directive 92/77, 1992 O.J. (L 316) 1.

⁶⁰ Council Directive 89/48, 1989 O.J. (L 19) 16, discussed in Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L. J. 556, 595 (1991-92).

⁶¹ The recent Community legislative initiatives are described in BERMAN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 11(d). The most notable achievements are Council Directive 89/104 to approximate the laws of the Member States relating to trademarks, 1988 O.J. (L 40) 1, and Council Directive 91/250 on the legal protection of computer programs, 1991 O.J. (L 122) 42.

⁶² For a description of the relevant case law, see the texts cited *supra* note 53. See also LAURENCE W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC, THE THEORY AND APPLICATIONS OF ARTICLES 30-36 OF THE EEC TREATY (1985); PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EEC UNDER ARTICLES 30 TO 36 OF THE ROME TREATY (2d ed. 1988).

Court's preemption doctrine⁶³ has broadened the scope and authority of Community action at the expense of national action.

Although social action (or what we in the U.S. would call employee rights measures) is not a stated field of action in Article 3, the EEC Treaty does contain a series of articles authorizing such action.⁶⁴ Social policy became an important and integral part of Community legislative activity with the first Social Action program of 1974.⁶⁵ In the late 1970s and 1980s, the Community adopted a number of measures intended to protect the economic interests of workers, their health and safety, and to achieve the economic and social equality of men and women in the workplace.⁶⁶ This process has recently accelerated due to a new social action program inspired by the European Council's adoption of the Social Charter for Workers on December 9, 1989.⁶⁷ A series of new employee rights measures have been proposed and two have already been adopted.⁶⁸

Article 3 of the EEC Treaty also called for action in the sphere of agriculture.⁶⁹ The Common Agricultural Policy (CAP) was set in place by a major series of market organization structures⁷⁰ adopted with great effort and considerable political jockeying in the 1960s and

⁶³ See *supra* text accompanying notes 37-41.

⁶⁴ EEC TREATY, *supra* note 1, arts. 117-27.

⁶⁵ Council Resolution of 21 January 1974 Concerning a Social Action Programme, 1974 O.J. (C 13) 1.

⁶⁶ Some of the important measures are Council Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, 1975 O.J. (L 45) 19; Council Directive 75/129 on the approximation of the laws of the Member States relating to collective redundancies, 1975 O.J. (L 48) 29; Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 39) 40; Council Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 1977 O.J. (L 61) 26; and Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, 1989 O.J. (L 183) 1. For a review of the legislation and related case law, see BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, chs. 33-34.

⁶⁷ The Community Charter of Fundamental Social Rights for Workers was proposed by the Commission in May 1989 and adopted by all the Member States except for the United Kingdom at the European Council meeting in Strassbourg, December 9, 1989. The Commission proposal appears at E.C. Bull. 1989/5, at 114.

⁶⁸ The two directives adopted thus far are Council Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, 1991 O.J. (L 288) 32, and Council Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work for pregnant workers and workers who have recently given birth or are breast-feeding, 1992 O.J. (L 348) 1.

⁶⁹ EEC TREATY, *supra* note 1, art. 3(d).

⁷⁰ The principal market organizations cover cereal, wine, and dairy products.

1970s.⁷¹ This has been supplemented since 1983 by the Common Fisheries Policy.⁷² The initial success of these programs in dramatically increasing the quantity and quality of production has in recent years been overshadowed by the problem of dealing with massive surpluses, both because of the cost of subsidies as a huge component of the Community budget, with consequent protests from taxpayers, and because of trade pressure from the United States, Canada, Australia, and other agricultural exporters, strenuously urging the Community to dismantle its tariff, quota, and subsidy protective devices.

A final major aspect of Article 3 is its proclamation of the need to create a Community competition policy.⁷³ Anti-competitive structures and market behavior can seriously restrict intra-Community trade and artificially partition the Community. Therefore, the competition policy was seen as essential to supplement the removal of state barriers of trade. The success of the Commission's vigorous enforcement policy, coupled with its on-going creation of regulatory guidelines for permissible restraints on competitive conduct, has been enhanced by Court of Justice case law supportive of the Commission's policies.⁷⁴

The SEA formally added environmental protection and pollution control policy as a sphere of Community action.⁷⁵ In fact, the first Environmental Action Program began in 1973.⁷⁶ Many important measures were adopted in the 1970s and 1980s through use of the "implied powers" clause, Article 235. The SEA accelerated the pro-

⁷¹ J. A. USHER, *LEGAL ASPECTS OF AGRICULTURE IN THE EUROPEAN COMMUNITY* (1988) (excellent survey of the complex Community rules). See also BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 31 (survey of market organization regulations and relevant case law).

⁷² See COMMISSION OF THE EUROPEAN COMMUNITIES, *THE COMMON FISHERIES POLICY* (European File 3/91); see also R.R. CHURCHILL, *EEC FISHERIES LAW* (1987).

⁷³ EEC TREATY, *supra* note 1, art. 3(f).

⁷⁴ The leading regulations and case law are analyzed in BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, chs. 18-25. Among the many valuable commentaries are CHRISTOPHER BELLAMY & GRAHAM D. CHILD, *COMMON MARKET LAW OF COMPETITION* (3d ed. 1987); D.G. GOYDER, *EEC COMPETITION LAW* (1988); BARRY E. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* (2d ed. 1991); VALENTINE KORAH, *AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE* (4th ed. 1990).

⁷⁵ SEA, *supra* note 6, art. 25 amending EEC TREATY, *supra* note 1, art. 130r-t.

⁷⁶ Declaration of the Council of the European Communities and the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the Environment, 1973 O.J. (C 112) 1. The Council acted at the request of the Member States' Heads of States and Government (later called the European Council) at their meeting in Paris in October 1972.

cess of legislative action taken through its new general harmonization of laws provision, Article 100a,⁷⁷ or through the new environmental articles, 130r to t.⁷⁸ In recent years, environmental action has become one of the richest fields of Community endeavors.⁷⁹ Indeed, the Treaty mandates concern for the environment in the review of any measure intended to achieve the internal market.⁸⁰

In view of the above description of the scope of the EEC Treaty, it is apparent that the limitation of the Community to "economic" spheres of action has not resulted in a narrow field of action, or a minor structure. To the contrary, the Community utilized its legislative and judicial competence to develop an extraordinarily broad coverage of virtually all aspects of commercial, technical, financial, professional, and agricultural activities. Moreover, the Community's social and environmental programs certainly go beyond traditional fields of economic action.

Although the Community's progress in establishing the internal market has been prominently featured in the media in recent years, and is accordingly well-known to the general public, the precise nature and extent of Community regulation is not well understood. Because the bulk of Community legislation, apart from the agricultural and competition sectors, is in the form of directives,⁸¹ or frameworks for national legislation and regulations, the general public is frequently not aware that the new rules that regulate its economic or social well-being have come from the Community. Unless individuals do business in, or travel to, other Member States, they may not be aware that the same rules pervade the Community. The management of multinational or larger business enterprises are fully cognizant of

⁷⁷ SEA, *supra* note 6, art. 100a.

⁷⁸ *Id.* art. 130r-t.

⁷⁹ For a description of environmental protection policy, see STANLEY P. JOHNSON & GUY CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* (1989); ECKARD REHBINDER & RICHARD STEWART, *ENVIRONMENTAL PROTECTION POLICY, in INTEGRATION THROUGH LAW* (1985). Among the valuable articles are Auke Haagsma, *The European Community's Environmental Policy: A Case-Study in Federalism*, 12 *FORDHAM INT'L L.J.* 311 (1989); Dirk Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 *EUR. L. REV.* 407 (1987); Rolf Wägenbaur, *The European Community's Policy on Implementation of Environmental Directives*, 14 *FORDHAM INT'L L.J.* 455 (1990-91).

⁸⁰ SEA, *supra* note 6, art. 100a(3).

⁸¹ Directives are the principal form of Community legislation. They are binding upon the Member States, which must implement them in an appropriate form, usually by law, regulation, or decree. EEC TREATY, *supra* note 1, art. 189. The other form of Community legislation is a regulation, which is "directly applicable in each Member State." *Id.* In the United States, a Congressional statute would be the equivalent of a regulation.

the Community rule-making, but local enterprises do not necessarily realize the extent of Community, as opposed to national, rules. There is undoubtedly not the same understanding of the importance and scope of Community rule-making, as there is of that of the federal government in the United States.

However, many spheres of action of modern governments remain outside of present Community competence. Thus, although the SEA's Title III did authorize a system for achieving a common foreign policy, the structure is quite limited in character, is largely divorced from the basic Community institutions, and requires unanimous action.⁸² The Community's inability to fully coordinate Member State views and execute a decisive common policy has been painfully apparent in its limited and hesitant reaction to the civil war in the former Yugoslavia.

Similarly, the Community has had only marginal success in monetary coordination. The European Monetary System (EMS) was set up in 1979 to coordinate national monetary policy, provide reserve support in monetary crises, create an artificial monetary currency unit (the ECU), and keep exchange rate fluctuations within a narrow band.⁸³ The EMS worked relatively well until the serious monetary crisis of September 1992.⁸⁴

That crisis demonstrated its weakness in the face of massive currency movements fueled by serious differences in uncoordinated Member State monetary policies. The United Kingdom, Italy, and

⁸² SEA, *supra* note 6, Title III. The Member States' cooperation to achieve a common foreign policy is outside the institutional structure of the European Community and is governed only by Title III. In fact, cooperation on foreign policy began at the direction of the European Council in the early 1970s, so that Title III in large measure only formalizes the prior system, called European Political Cooperation (EPC). David Freestone & Scott Davidson, *Community Competence and Part III of the Single European Act*, 23 COMMON MKT. L. REV. 793 (1986); Eric Stein, *European Foreign Affairs System and the Single European Act of 1986*, 23 INT'L LAW. 977 (1989).

⁸³ E.C. Bull. 1978/6, at 17. For a description, see COMMISSION OF THE EUROPEAN COMMUNITIES, *THE EMS: TEN YEARS OF PROGRESS IN EUROPEAN MONETARY COOPERATION* (1989)[hereinafter *THE EMS*]; BERMAN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 35(B).

⁸⁴ The monetary crisis was triggered by the radical difference between Germany's monetary policy to combat inflation and the anti-recessionary policy pursued by France, Italy, Spain, the United Kingdom and other states. Lionel Barber & David Marsh, *Helping Others Help Themselves: The Weekend's Currency Manoeuvres*, FIN. TIMES, Sept. 15, 1992, at 18; Alan Cowell, *Kohl Urges Europe to Meet in Effort to Preserve Unity*, N.Y. TIMES, Sept. 9, 1992, at A1; Alan Riding, *Turmoil in Europe; French Approve Unity Treaty, But Slim Margin Leaves Doubts*, N.Y. TIMES, Sept. 21, 1992, at A1; Craig R. Whitney, *Kohl Denies Secret Plan to Force European Union*, N.Y. TIMES, Sept. 25, 1992, at A3; Alan Cowell, *Italian Stakes Office on Austerity*, N.Y. TIMES, Sept. 28, 1992, at A6.

Greece are now outside the Exchange Rate Mechanism of the EMS, and it is uncertain when they will choose to enter or re-enter it.

The Community's lack of power in several other fields of essential governmental action tends to shape the popular view of it as less than a total federal system. Virtually no independent government functions without a system of national defense and police power, yet the Community has no jurisdiction whatsoever in those spheres. The Community is also almost totally without power in the fields of education, except vocational training; public health, except protection of worker health and safety, and the harmonization of health and safety standards for products and services; and culture.

In sum, to the average person within the Community (and even more, to the less knowledgeable observer outside of the Community), the Community's scope of action is a bit vague and indefinite. Community action is generally perceived to be limited to the economic sphere, with some spill-over into the social and environmental spheres. Although the popularly perceived manifestations of the success of the internal market program has enhanced the reputation of the Community, the Community is still not regarded by most people as anything other than an economic federation in which the Member States are linked for their mutual benefit. Moreover, most people do not have a very clear idea of the degree to which Member States have transferred legislative, administrative, or judicial powers to the Community, the subject to which we now turn.

III. FEDERAL (OR SUPRANATIONAL) CHARACTERISTICS OF THE EUROPEAN COMMUNITY

If the EEC Treaty were an ordinary international agreement or convention to facilitate trade and investment among its signatories, as, for example, the European Free Trade Association, then the signatory states would continue to deal with one another as fully sovereign entities, bound only to the extent their obligations are enforceable under customary doctrines of public international law. This was the view taken by the Court of Justice in its opinion assessing the essential character of the EEA Agreement between the Community and the EFTA states,⁸⁵ even though the EEA Agreement goes much further in creating intergovernmental structures than do most international agreements.⁸⁶

⁸⁵ See *supra* notes 42-43.

⁸⁶ The Court said specifically that: "[t]he EEA is to be established on the basis of an

In contrast, the Treaty of Rome created a supranational structure with substantial governing authority. Moreover, this governing authority was intended to be capable of binding the Member States, and to be permanent, or at least for an indefinite term.⁸⁷ The Court of Justice focused on these and other features of the Community in describing the Community as a "new legal order" in *Van Gend en Loos* and other landmark decisions.⁸⁸

This section analyzes the Community's institutional structure, as established in the Treaty of Rome and modified by later amendments, notably the Single European Act. In discussing the Community's legislative or regulatory, executive or administrative, and judicial authority, this section examines the degree to which the Community constitutes a federal or at least a supranational system.

A. Legislative or Regulatory Powers

Unlike virtually all international agreements or conventions, which provide for decision-making by the constituent signatories only by consensus or unanimous accord, the EEC Treaty has from its inception provided that many types of legislation can be adopted by a majority or, more often, a qualified majority vote of the Council of Ministers.⁸⁹ Also, all legislation, whether in the form of regulations or directives, is binding on Member States. The Commission may proceed in the Court of Justice against Member States for non-compliance with Treaty obligations, or legislation adopted pursuant to the Treaty.⁹⁰ The States must comply with the Court's decisions.⁹¹

international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up." Opinion 1/91, *supra* note 43, ¶ 20, [1992] 1 C.M.L.R. at 268-69.

⁸⁷ Unlike the ECSC Treaty which has a fifty-year term, the EEC Treaty has no stated duration. *Supra* note 1.

⁸⁸ See *supra* text accompanying notes 13-26.

⁸⁹ The EEC Treaty provided only occasionally for simple or ordinary majority voting by the Council of Ministers, notably to achieve free movement of workers (Article 49) or to adopt vocational training measures (Article 128 coupled with Article 140(1)). EEC TREATY, *supra* note 1. The SEA modified Article 49 to require qualified majority voting. SEA, *supra* note 6. Qualified majority voting is described in the text *infra* note 92.

⁹⁰ See text at notes 146-47, *infra*, for a description of the proceedings under EEC Treaty Art. 169. Article 169 proceedings have become very common, numbering between 50 and 100 each year. The Commission is usually victorious and the Member States ultimately comply with the Court's judgment. For analysis of cases illustrating the procedure and common State defenses, see BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 8B. See also SCHERMERS, *supra* note 11, at 277-315; Dashwood & White, *Enforcement Actions*, *supra* note 17.

⁹¹ EEC TREATY, *supra* note 1, art. 171.

These provisions manifestly represent a transfer of legislative power from the Member States to the Community institutions. While the Community can legislate only in spheres in which it has jurisdiction under the Treaty, or in which the Court has construed the Treaty to grant implied legislative authority, this constitutes a broad and steadily increasing field of action.

Even under the original Treaty of Rome, substantial legislation could be adopted by a qualified majority vote of the Council of Ministers. This included legislation to achieve the free movement of services and of capital; to further the right of commercial establishment; and to attain agricultural policy, transport policy, and competition policy goals.⁹²

The SEA greatly increased the volume of legislation that can be adopted by a qualified majority, chiefly by dictating that legislation to harmonize rules in order to complete the internal market, Article 100a, can be adopted by a qualified majority vote, instead of by unanimous action, as had been required to adopt harmonization directives under the original Article 100.⁹³

Today, relatively few measures necessitate the Council's unanimous vote. The principal ones are in areas which remain politically sensitive, related to Member State tax, monetary, and social policy. Thus, the EEC Treaty continues to require unanimous Council action for the harmonization of indirect⁹⁴ and direct taxes,⁹⁵ for monetary conjunctural measures,⁹⁶ for social action,⁹⁷ and for free movement of

⁹² The general approach in the Treaty of Rome for many types of legislation was to require unanimous Council action for the first stage of the transitional period phasing in the Treaty (i.e., 1958-61) and sometimes also the second stage (1962-65), while prescribing qualified majority voting thereafter. EEC TREATY, *supra* note 1, arts. 43 (agriculture), 54 (right of establishment), 63 (right to provide services), 69 (free movement of capital), 75 (common transport policy), 87 (competition policy).

In a qualified majority vote, each Member State's votes are allocated a weighted number, somewhat in proportion to its population and economic power, varying from two votes for Luxembourg to ten for France, Germany, Italy, and the United Kingdom. The total weighted vote is 76; 54 votes, or about two-thirds of the votes, is necessary to adopt a measure. EEC TREATY, *supra* note 1, art. 148(2). The total number of weighted votes and the requisite number of votes to attain the qualified majority has, of course, been modified each time new Member States have joined the Community. This system of voting is intended to insure, on the one hand, that not more than two large States can be outvoted, and, on the other hand, that a measure cannot be adopted unless a majority of all States vote in favor of it.

⁹³ This change in the voting system has enabled the adoption of proposals in fields where action had long been blocked. White Paper, *supra* note 54.

⁹⁴ EEC TREATY, *supra* note 1, art. 99.

⁹⁵ *Id.* art. 100a(2).

⁹⁶ *Id.* art. 103(2).

persons who are not workers.⁹⁸

For much of its history the Council functioned as though unanimous voting were required, although a qualified majority was sufficient in many spheres of action. This was due to the general acceptance of the Luxembourg Compromise.

In 1965, President De Gaulle of France became incensed at Commission proposals, largely identified with the first Commission President, Walter Hallstein, to improve the Community's structure. The principal proposals were to increase use of qualified majority voting, to provide the Community with its own source of revenues, and to allow the Parliament to be elected directly—all of which have since come to pass. De Gaulle removed French representatives from all Community meetings, engendering a political crisis that lasted for several months. In January 1966, the Member State representatives met in Luxembourg and worked out a compromise formula. The key paragraphs read:

1. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the members of the Council will endeavor, within a reasonable time, to reach solutions which can be adopted by all the members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.
2. With regard to the preceding paragraph, the French delegation considers that when very important issues are at stake, the discussion must be continued until unanimous decision is reached.⁹⁹

For many years, France and other Member States, notably the United Kingdom after its accession in 1973, interpreted the Luxem-

⁹⁷ *Id.* art. 100a(2). Article 100a(2) continues to require unanimous voting on measures concerning employee rights, but the SEA makes an exception for worker health and safety measures, where it permits qualified majority voting. SEA, *supra* note 6, art. 118a.

⁹⁸ *Id.* Measures to achieve free movement of workers may be adopted by qualified majority voting under Article 49, so that the reference to measures to attain free movement of persons in Article 100a(2) must be read as covering only persons who are not workers, e.g., students and retired persons. *Id.* In fact, legislation has recently been adopted to grant rights of free movement and residence to students, retired persons and persons who do not work or have never worked. See Council Directive 90/364, 1990 O.J. (L 180) 26; Council Directive 90/365, 1990 O.J. (L 180) 28; Council Directive 90/366, 1990 O.J. (L 180) 30.

⁹⁹ The text of the Luxembourg Compromise appears in Legislation Section, 3 COMMON MKT. L. REV. 469 (1965-66) and is partially reproduced in BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, at 54. The Luxembourg Accord represented calculated ambiguity, because the Member States other than France did not expressly agree with France, but, on the other hand, did not oblige France to recognize that its view did not accord with express Treaty provisions.

bourg Compromise to mean that all large Member States had an effective veto on legislative proposals. Clearly, this made qualified majority voting illusory, and the Treaty resembled an ordinary international convention.

However, the Single European Act has effectively swept away the Luxembourg Compromise. While the SEA makes no reference to the Compromise, its substantial expansion of qualified majority voting has, in practice, resulted in an effective disavowal of the Compromise. In its Annual Reports to Parliament since the SEA, the Commission has observed that qualified majority voting has been adhered to faithfully in practice.¹⁰⁰ An examination of votes taken on important measures shows that even large States allow themselves to be outvoted.

Perhaps even more important than the Council's qualified majority voting as an indication of the federal, or supranational, nature of the Community is the participation of a directly-elected Parliament in the legislative process. The initial Treaty of Rome clearly intended the Parliament (originally called the Assembly) to be a rather unimportant body.¹⁰¹ Its chief role was to exercise a moderate level of influence over the Commission. The Commission must provide an annual report to the Parliament, must reply to written or oral parliamentary questions, and may be subject to a vote of censure.¹⁰² Other-

¹⁰⁰ See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, XXIND GENERAL REPORT OF THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1988, at ¶ 4 (1989) [hereinafter XX^{II}ND GENERAL REPORT]. "The now fully accepted possibility of adopting a decision by a qualified majority forces the [Member State] delegations to display flexibility throughout the debate, thus making decision-making easier. The dynamism generated in those areas in which majority voting is possible . . . has led to decisions on major issues . . ." *Id.* For an interesting analysis of the implicit repudiation, or at least limitation, of the Luxembourg Compromise, see J.J.H. Weiler, *supra* note 12, at 2458-61.

¹⁰¹ See EEC TREATY, *supra* note 1, arts. 137-44. The Parliament disliked the name "Assembly" and commenced using the name "Parliament" to describe itself almost at once, with a view to stressing its resemblance to the role of the French or UK Parliaments. The other institutions accepted this term in the 1970s, and the name was formally changed to "European Parliament" by the Single European Act. SEA, *supra* note 6, Title I, art. 3.

¹⁰² The Commission must prepare an annual "general report on the activities of the Community." EEC TREATY, *supra* note 1, art. 156. The report is then the subject of parliamentary debate. *Id.* art. 143. The Commission must reply "orally or in writing to questions put to it by the Assembly or its members." *Id.* art. 140. The Parliament makes extensive use of this question procedure both to secure information and to incite the Commission to action. In 1991 the Parliament tabled 2,905 written and 838 oral questions for answer by the Commission. XXVTH GENERAL REPORT, *supra* note 57, ¶ 1160. Since the early 1980s, the Council has also voluntarily responded to questions from Parliament — in 1991, 257 written and 238 oral questions. Finally, the Parliament may vote to censure the Commission. If the vote carries by a two-thirds majority, the Commission must resign. *Id.* art. 144. Although this ap-

wise, the Parliament was limited to giving advice on certain types of legislation, and had no role in other matters.¹⁰³

Throughout the 1960s and 1970s, the Parliament lobbied intensively for greater status. The so-called "democratic deficit" constituted by Parliament's weak stature became widely recognized. Certain Member States, notably Germany and Italy, increasingly supported Parliament's aspirations.

The Parliament's stature was dramatically raised when Parliament became elected directly by Member State nationals. In the prior system of election, national parliaments elected the Members of Parliament. Although the Treaty of Rome anticipated that the Assembly might be directly elected,¹⁰⁴ the French Government under President De Gaulle opposed this. At their 1974 summit meeting in Paris, the Member States' Heads of State and Government finally decided to allow direct election. The Council adopted the necessary measure in 1976,¹⁰⁵ and Parliament's first direct election occurred in June 1979, with successive elections at five-year intervals. Because Parliament is now directly elected, it can claim a popular democratic mandate that entitles it to a greater share in Community governance.

The SEA created a new legislative procedure involving the Parliament more deeply, and applied the procedure to a substantial number of legislative measures, including measures intended to harmonize rules to achieve the internal market under Article 100a, or to facilitate free movement of workers under Article 49, or to facilitate rights of establishment under Article 54. This legislative process, usually called the parliamentary cooperation procedure, permits Parliament to examine legislative proposals at two different stages in the

pears to be sweeping power, it is unlikely to be used, since Parliament is much more apt to be critical of the Council than of the Commission.

¹⁰³ The initial Treaty of Rome text provided that the Parliament had to be consulted before the Council could adopt several types of legislation, *e.g.*, measures to carry out the CAP, art. 43, or the common transport policy (art. 75), to achieve the right of establishment (art. 54), and to implement competition policy (art. 87). *TREATY OF ROME*, *supra* note 1. For many other types of legislative action, the Parliament did not have to be consulted. Furthermore, its advice could, of course, be disregarded. The obligation to consult the Parliament was, however, an absolute condition for the validity of the legislation to be adopted by the Council. *Case 138/79, S.A. Roquette Frères v. Council*, 1980 E.C.R. 3333. For a general description of Parliament, its role and powers before and after the SEA, *see* HARTLEY, *supra* note 11, at 23-49; KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 11, at 131-45; MATHIJSEN, *supra* note 11, at 16-34.

¹⁰⁴ EEC TREATY, *supra* note 1, art. 138.

¹⁰⁵ Council Act concerning the election of the representatives of the Assembly by direct universal suffrage, 1976 O.J. (L 278) 5.

process, and at each time it has the right to propose amendments.¹⁰⁶ Although Parliament's amendments are not binding, they are highly influential, in part because in the final stage the Council can only reject a parliamentary amendment by unanimous vote. The Commission has estimated that since the Single European Act, a large number of Parliament's proposed amendments have been accepted.¹⁰⁷ Thus, Parliament has become an active and influential participant in the legislative process.

Parliament's very existence as a directly elected body is a strong token of a federal structure in the Community, because Parliament draws its popular mandate immediately from the people of the Community. As the Parliament gains a growing share of influence in the legislative, budgetary,¹⁰⁸ or other aspects of the political process,¹⁰⁹ its role not only augments the democratic character of the Community, but also enhances its federal nature.

Thus, in conclusion, substantial legislative and regulatory authority, in ever-expanding fields of action, has been transferred from the Member States to Community institutions. The Council of Ministers, which remains the paramount body in the legislative process,

¹⁰⁶ The complex parliamentary cooperation system outlined in Article 149(2), requiring two distinct stages of examination ("readings") by the Council and the Parliament, and indicating the voting requirements and time periods, is described in BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 3C, as well as in each of the texts cited in note 103 *supra*. See also Roland Bieber, *Legislative Procedure for the Establishment of the Single Market*, 25 COMMON MKT. L. REV. 711 (1988); Darryl S. Lew, Note, *The EEC Legislative Process: An Evolving Balance*, 27 COLUM. J. TRANSNAT'L L. 679 (1988).

¹⁰⁷ Since 1987, 46 percent of the amendments proposed by Parliament in its first reading, and 27 percent of those proposed in its second reading, have ultimately been incorporated in the legislation. XXVTH GENERAL REPORT, *supra* note 57, at ¶ 1149. This suggests that Parliament exerts a strong influence in the legislative process, but the Council's views continue to be decisive.

¹⁰⁸ The budgetary process is outlined in EEC TREATY, *supra* note 1, arts. 202-206. The budgetary process is even more complicated than the legislative process and has, in practice, resulted in incessant disputes between the Council and the Parliament over their respective powers. The Council's role is by far predominant. KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 11, at 208-39.

¹⁰⁹ The SEA, *supra* note 6, granted Parliament the right to assent (*i.e.*, a veto right) before any applicant state can become a new Member State, art. 237, and before the entry into effect of any association agreement, granting special trade and investment rights, with third states. *Id.* art. 238. In addition, Parliament has sought in recent years to acquire standing to challenge the conduct of the Council in proceedings before the Court of Justice. The Court has recognized Parliament's implied power to sue the Council for the latter's failure to fulfill its clearly prescribed Treaty obligations, Case 13/83, *Parliament v. Council* (involving common transport policy), 1985 E.C.R. 1513; and for the Council's failure to respect, under some circumstances, Parliament's prerogatives the parliamentary cooperation process, Case C-70/88, *Parliament v. Council* (Post-Chernobyl), 1990 E.C.R. I-2041.

acts on most types of measures by qualified majority vote. Because qualified majority has increasingly meant that one, or even several, Member State(s) have been outvoted, the legislative process represents a system of transferred sovereignty from the Member States. Moreover, the augmented role given to Parliament through the parliamentary cooperation procedure enhances the picture of transferred sovereignty. In its legislative role, as in its other powers, the Parliament acts through a direct popular mandate, further promoting the reality of sovereignty transfer from Member States to the Community.

B. *Executive or Administrative Authority*

While the Community institutions have sweeping administrative powers, what is usually regarded as the executive component in a governmental system exists only partially in the Community structure.

The EC Commission is the center of administrative operations.¹¹⁰ The Commission, composed formally of seventeen Commissioners chosen by the Member States for renewable four-year terms, is the acme of the civil service bureaucracy of the Community.¹¹¹ The EEC Treaty stresses that the Commissioners are to be independent of the States which selected them.¹¹² The independence of the Commission has been a strong feature in Community history.

Although the President of the Commission, also designated by the Member States,¹¹³ has a central role in Community affairs, and does much more than merely chair Commission meetings, the Treaty provides him with no specific authority.¹¹⁴ Custom developed over the course of Community history, together with the dynamic person-

¹¹⁰ EEC TREATY, *supra* note 1, arts. 155-63 (delineates the composition, role, and functioning of the Commission). For detailed descriptions, *see* the texts cited *supra* note 103.

¹¹¹ EEC TREATY, *supra* note 1, arts. 157-58. The Commission's staff, organized in twenty-three Directorates-General corresponding to various administrative units and fields of activity, together with the Commission Secretariat, Legal Service, Information Service, Language Service, and Office of Official Publications, represents a substantial and quite efficient civil service. Most posts are chosen by competitive examinations open to all Community nationals. The Commission's permanent staff numbered 12,599 in 1991. XXVTH GENERAL REPORT, *supra* note 57, ¶ 1170.

¹¹² The Commissioners' "independence [must be] beyond doubt" and they "shall neither seek nor take instructions from any Government or from any other body." EEC TREATY, *supra* note 1, art. 157.

¹¹³ The President serves for two-year renewable terms. EEC TREATY, *supra* note 1, art. 161. The six Vice-Presidents' role is largely ceremonial. *Id.*

¹¹⁴ The Treaty does not even expressly state that the President should chair meetings of the Commission or represent the Commission to any other body within or outside the Community structure.

ality and political sense of certain Commission Presidents, such as Walter Hallstein, the first President, Roy Jenkins during the 1970s, and Jacques Delors today, have augmented the status of the Commission President. Today, the President is the principal shaper of the Commission agenda in internal matters, and is the Commission's spokesperson.¹¹⁵

The Commission as a whole, and each Commissioner as department head, exerts enormous administrative authority.¹¹⁶ By virtue of specific Treaty provisions, or more often through delegation of powers from the Council, the Commission administers major spheres of Community action. It issues regulations, makes policy decisions, and supervises the bureaucracy's operations.¹¹⁷ The Commission, *inter alia*, proposes all legislative texts;¹¹⁸ drafts the initial budget proposals, and supervises Community expenditures;¹¹⁹ administers competition¹²⁰ and protective trade policies;¹²¹ administers the Common Agricul-

¹¹⁵ The President of the Commission is a member of the European Council along with the Heads of State and Government of the Member States. SEA, *supra* note 6, at Title I, art. 2. It would seem implicit that the President's role is to represent the Commission at the meetings of the European Council. The President's role as Commission spokesperson to the general public is based only on custom.

¹¹⁶ Each Commissioner is allocated one or two Directorates-General as his or her portfolio. Commissioners devote a substantial part of their working time to supervision of these units and have great influence in shaping Commission policy in the field of action represented in the Directorates-General. The word "her" became realistic in 1989, when, for the first time, two women became Commissioners.

¹¹⁷ Some articles give the Commission direct power to adopt regulations. EEC TREATY, *supra* note 1, art. 33(7) (directives to facilitate the free movement of goods), art. 90 (directives to limit state subsidies). Most Commission regulatory and decision-making powers come by delegation from the Council through express legislative authority. Complicated systems have been set up by the Council in the agricultural field, and subsequently in other areas, to ensure that the Commission keeps working committees of the Council informed of proposed Commission action, and in some instances to enable the working committees to veto the proposed action. KAPTEYN & VERLOREN VAN THEMAT, *supra* note 11, at 240-47.

¹¹⁸ In fact, one of the chief sources of the Commission's influence is the exclusive power to draft legislation given to it by the Treaty in the generic description of the legislative process in Article 149, and in the various specific grants of legislative power in other Treaty articles. The Commission also supervises the progress of proposals through the various stages of examination and may alter the draft text at any time. EEC TREATY, *supra* note 1, art. 149(3).

¹¹⁹ The Commission prepares the preliminary draft budget. EEC TREATY, *supra* note 1, art. 203(2). The Commission also implements the authorized spending. *Id.* art. 205.

¹²⁰ Since the early 1960s, the Commission has followed a very active policy of challenging and restricting anti-competitive market structures and practices. Its regulations and decisions are voluminous and complicated. See *supra* note 74.

¹²¹ The Community has developed a major field of trade protective regulations since the late 1970s. The principal burden of investigation of complaints and adoption of protective measures against dumped or subsidized imports falls upon the Commission, although the Council must also be involved in the final stage, and there are occasional appeals to the Court of Jus-

tural Policy;¹²² ensures that Member States implement directives, and otherwise fulfill their Treaty obligations;¹²³ and carries out studies producing valuable reports in the economic, monetary, and social fields.¹²⁴

While there is no dearth of evidence to demonstrate that the Commission constitutes a powerful central administrative civil service at the heart of Community operations,¹²⁵ there is no executive body possessing authority analogous to that exercised by a president, prime minister, or chancellor in national state systems. The President, and the Commission as a whole, administratively implement Treaty-based responsibilities, but have no great executive authority.

Turning next to the Council of Ministers, neither that body, nor its President, can realistically be described as exercising significant executive authority.

The representative of each Member State serves as President of the Council for a six-month term, with a listed order of succession among the Member States.¹²⁶ Although Article 146 is silent as to the role of the President of the Council of Ministers, the President does

tice. For an analysis of the principal rules and case law, see BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, chs. 29-30. See also J. F. BESELER & A. N. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES* (1986); IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS OF THE EEC* (2d ed. 1990); EDWIN A. VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* (1987).

¹²² The Commission has undoubtedly spent more time and effort in structuring the regulatory systems to implement the market organizations and other aspects of the CAP than on any other Commission task. See *supra* note 71.

¹²³ See the discussion of Article 169, *infra* notes 146-47.

¹²⁴ In addition to the Annual General Reports made to the Parliament, the Commission produces annual reports on agriculture, competition policy, consumer rights protection, environmental policy and social policy, all extremely valuable. The Commission produces a wealth of other studies pursuant to express Treaty mandates, including Article 80, transport studies, Article 118, social field studies, or to prepare the basis for legislative action, or provide statistical and other information requested by the Council or Parliament. The many studies and reports published are useful sources of data.

¹²⁵ The Council of Ministers also has a central administrative presence through its Brussels office. The Council's Committee of Permanent Representatives, or COREPER, substantially assists the Council in the review of legislative or other action. EEC TREATY, *supra* note 1, art. 151. Working groups and committees in Brussels provide expertise in particular sectors and facilitate relations with the Commission and the Parliament. In 1991 the Council's permanent staff numbered 3062. XXVTH GENERAL REPORT, *supra* note 57, ¶ 1161.

¹²⁶ EEC TREATY, *supra* note 1, art. 146. Interestingly, Article 146 does not specify any role for the President, although it seems implicit in the title that he or she, or an authorized representative, chair all meetings of the Council. By custom, this prerogative of chairing meetings extends to all working groups or other lower level gatherings of representatives of Member States.

more than chair Council meetings. In the last decade, the Head of Government of each Member State tends to set the agenda for the Council during that State's six-month term.¹²⁷ Determined advocacy by the State representative when chairing meetings often significantly advances a proposal toward adoption by the Council.

A six-month period is far too short for any Council President to have any long-term influence on Council operations. To facilitate continuity, in recent years a cooperative *troika* arrangement has linked the office of the current President with that of his or her immediate predecessor. This can, however, only have limited impact.

In one respect, the Council as a whole serves as a collective executive: the Council enters into any international agreements on behalf of the Community within the scope of the Community's external relations and trade powers.¹²⁸ Moreover, the Council shapes external and trade relations, inasmuch as the Council directs the Commission, which has the exclusive power to negotiate agreements,¹²⁹ to enter into negotiations, and gives guidance during the course of the dealings with third-party states or within GATT.¹³⁰

As for the European Council, that body can also be said to exercise executive authority in a certain sense, because its policy decisions tangibly shape later Community action. The European Council, composed of the Heads of State or Government of the Member States, received formal status through Title I of the Single European Act. In fact, however, the European Council has met regularly, two or three times a year, since President Pompidou of France invited the other State leaders to summit meetings starting in 1969.¹³¹ The SEA does not delineate any specific rule for the European Council. In practice, its meetings serve as fora to debate political issues that the Council has not been able to resolve, to decide questions of long-term policy,

¹²⁷ In recent years, the custom has developed that the incoming Council President indicates his or her agenda and policy views in information releases. The agenda is summarized in the monthly EC Bulletin.

¹²⁸ EEC TREATY, *supra* note 1, art. 228(1).

¹²⁹ *Id.*

¹³⁰ Article 113, which describes how the Community should fashion and carry out its CCP, contains Section (3) which indicates that the Council authorizes all Commission negotiations with third states. *Id.* Section (3) further requires the Commission to follow any Council negotiating directives and to coordinate with a Council committee, commonly called 113 committees. *Id.* The Council makes active use of Article 113(3).

¹³¹ The Paris summit meeting of December 9-10, 1974 decided that these meetings should be held regularly, at least three times a year. The SEA gave the European Council its formal name, in use since the early 1980s, and prescribed that it meet at least twice a year, but attributed it neither a specific role nor particular powers. SEA, *supra* note 6, Title I, art. 2.

to launch new programs of action, and to issue major statements of a political character.¹³² Among the latter have been the Stuttgart Declaration on European Union in 1983,¹³³ the Copenhagen Declaration on Democracy in 1978,¹³⁴ and the Social Charter in 1989.¹³⁵

By virtue of the personal authority wielded by the Heads of State or Government, the European Council represents in a certain sense the most powerful political body in the Community. However, the European Council never takes any binding legal action, leaving this to the regular Community institutions. It would therefore be inaccurate to characterize the European Council as a collective executive, as is, for example, the Federal Council in Switzerland.

In conclusion, the Community manifestly has a powerful center for administration in the Commission. The Commission as a collective body, and each Commissioner individually, directs and supervises the process of issuing regulations and decisions to supplement legislation, of enforcing Community law, of controlling Community expenditures, and of carrying out general administrative authority. Within the Commission, its President has attained a particularly high level of influence in developing policies and acting as Commission spokesperson.

On the other hand, neither the Commission nor its President, nor the Council or its President, nor the European Council constitutes a central executive authority commensurate in any degree with the chief executive in a national state. Although all three bodies exercise a certain level of executive power in particular sectors, and the European Council certainly represents the highest level of policy-making power, a true executive structure is clearly lacking.

To some degree, this is the principal reason why observers tend to doubt that the Community can properly be characterized as a federal state. It is, perhaps, a bit hard to conceive of a federal system that lacks a single powerful executive.

¹³² BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, at 55-57; KAPTEYN & VERLOREN VAN THEMATAAT, *supra* note 11, at 25-27.

¹³³ See *supra* note 8.

¹³⁴ The Copenhagen Declaration on Democracy indicated that the Community would "safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights." E.C. Bull. 1978/3, at 6. The Declaration concluded with the admonition that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership." *Id.* This represented an implied warning to Greece, Spain, and Portugal, then applicants, that they could not revert to authoritarian regimes.

¹³⁵ The Community Charter of the Fundamental Social Rights for Workers, *supra* note 67.

C. *Judicial Authority*

In considering the sovereign powers transferred from constituent states to a central governmental structure, judicial authority does not, at first glance, bulk very large. But, on further reflection, the exercise of significant judicial authority by the central government does indeed represent a very important part of a federal or supranational system.

The Treaty of Rome created a rather unusual judicial system. The sole Community court was the Court of Justice, sometimes called the European Court of Justice.¹³⁶ The Treaty did not create a system of district or trial courts to serve with the Court of Justice; rather, the existing national courts in each Member State were directed to apply Community law. Although the Single European Act authorized the creation of a Court of First Instance (CFI) to supplement the Court of Justice,¹³⁷ the CFI does not in any way substitute for national courts. The rule of the CFI is to handle trials involving disputes between Community institutions and their employees, and to provide an initial appellate review of Commission decisions in competition proceedings and in the administration of the ECSC.¹³⁸

The Court of Justice was probably intended by the Treaty draftsmen to have a rather minor role in the overall Community structure.¹³⁹ In fact, however, the Court has assumed a major role, developing legal doctrines such as the direct effect of certain Treaty articles and the primacy of Community law over national law, including the preemption doctrine, which have significantly enhanced the authority of the Community vis-a-vis its constituent Member States.¹⁴⁰ Equally important, the Court has broadly interpreted the scope of fundamental Community fields of action as set out in the Treaty or secondary legislation, thus further expanding Community authority.¹⁴¹

The EEC Treaty accorded the Court two quite natural roles.

¹³⁶ EEC TREATY, *supra* note 1, arts. 164-88. The Court's institutional structure and jurisdiction is described in KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 11, at 145-73, and in SCHERMERS, *supra* note 11.

¹³⁷ EEC TREATY, *supra* note 1, art. 168a, as amended by SEA, *supra* note 6, art. 11.

¹³⁸ These are the classes of actions which the Council has thus far transferred from the Court of Justice to the Court of First Instance. There are pending proposals to add others. Article 168a permits a right of appeal on questions of law only from the Court of First Instance to the Court of Justice. EEC TREATY, *supra* note 1, art. 168.

¹³⁹ Hjalte Rasmussen, *The Court of Justice*, in COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW 190 (1983).

¹⁴⁰ See *supra* Part I.

¹⁴¹ *Supra* notes 51 and 62.

The first was to serve as an appellate review tribunal for the administrative and quasi-judicial decisions of the Commission, or, occasionally, the Council. The second was to decide whether Member States were properly fulfilling their obligations under the Treaty or secondary legislation, usually in an Article 169 proceeding brought by the Commission or, more rarely, in an Article 170 proceeding brought by one Member State against another.

The Court has acted quite effectively in both roles. As an appellate review tribunal, the Court has not only examined the substantive legal justification for Community administrative and quasi-judicial decisions, it has also established a system of procedural rights and elements of a fair hearing that all Community institutions must respect.¹⁴² Moreover, the Court has broadly interpreted its own appellate authority to encompass the review of Community legislation, to ensure that the proper procedures have been followed,¹⁴³ that the appropriate Treaty legal basis has been used in adopting legislation,¹⁴⁴ and that the legislation accords with higher norms of basic rights.¹⁴⁵

The Court has also been eminently successful in its role as adjudicator in proceedings to determine whether Member States have properly filled their Treaty obligations. Since the 1970s, the volume of Article 169 proceedings has increased enormously. In recent years the Court decides an average of sixty cases per year.¹⁴⁶ Manifestly, the Court has had occasion to review a considerable variety of issues and Member State defenses. The Community's success is evident

¹⁴² *Supra* note 32.

¹⁴³ See *S. A. Roquette Frères*, *supra* note 103 (Council regulation invalidated for failure to consult the Parliament, a procedural requirement for agricultural legislation under Article 43).

¹⁴⁴ See, e.g., Case C-300-89, *Commission v. Council* (Titanium-dioxide), 1991 E.C.R. — (not yet reported) (Council directive invalidated because based on Article 130s instead of 100a); Case 68/86, *United Kingdom v. Council* (Agricultural hormones), 1988 E.C.R. 855 (Council directive based on Article 43 upheld against a challenge claiming that Article 100 should have been the legal basis).

¹⁴⁵ See *supra* note 27 and accompanying text for a discussion of *Internationale Handelsgesellschaft*. The Court in this decision, and frequently in others, has reviewed Community legislation by applying the doctrine of proportionality, derived from German and French administrative law, to determine whether aspects of the legislation go further than necessary to achieve its goal. In the famous *Skimmed-milk powder* case, the Court invalidated an agricultural regulation because it violated the principle of proportionality by imposing a discriminatory economic burden on animal feed producers in order to benefit dairy farmers. Case 114/76, *Bela-Mühle Josef Bergmann KG v. Grow's-Farm GmbH*, 1977 E.C.R. 1211.

¹⁴⁶ At the end of the Commission's Annual General Reports to Parliament there are charts which break down the Court's caseload for the year which is the subject of the report. In 1991 the Commission brought 59 Article 169 proceedings, and the Court decided 62 of those cases. XXVTH GENERAL REPORT, *supra* note 57, Annexes, Table 2.

from the fact that the Court decides against the Member States in almost ninety percent of the cases, but the Member States always ultimately comply with the decisions.¹⁴⁷

A more surprising success of the Court has come in its role as guide and teacher for national courts in their enforcement of Community law. As noted above, Community trial courts were not created by the Treaty of Rome, nor have they been added by the SEA or the Maastricht Treaty (despite proposals to do so). Instead, the EEC Treaty imitated the German and Italian systems for the referral of constitutional law questions by other courts to the Constitutional Court.

Member State trial and appellate courts may refer questions of Community law to the Court of Justice, and courts of last appeal must refer such questions.¹⁴⁸ The questions referred must be "necessary" to the national court proceeding, a term that is not without ambiguity. The Court of Justice has interpreted "necessary" broadly. In practice it means that the Court will answer any question relevant to the outcome of the national proceeding.¹⁴⁹ The Court's responses are not merely opinions or suggestions; they represent a binding statement of Community law which the referring court, and any other court dealing then or later with the identical issue, is obligated to follow.¹⁵⁰ The primacy of Community law doctrine takes on enormous importance in this context, because in the national courts employing

¹⁴⁷ On occasion, a Member State is dilatory in complying with the Court's judgment, so that the Commission brings a new proceeding under Article 171 to enforce the prior judgment. The leading precedent on this is Case 48/71, *Commission v. Italy* (Second art treasures), 1972 E.C.R. 527.

¹⁴⁸ EEC TREATY, *supra* note 1, art. 177. There is a considerable volume of literature on Article 177. Some valuable articles are: Anthony Arnall, *References to the European Court*, 15 EUR. L. REV. 375 (1990); Gerhard Bebr, *The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty*, 25 COMMON MKT. L. REV. 667 (1988); Manfred A. Daus, *Practical Considerations Regarding the Preliminary Ruling Procedure under Article 177*, 10 FORDHAM INT'L L.J. 538 (1987); Hjalte Rasmussen, *The European Court's Acte Clair Strategy in CILFIT*, 9 EUR. L. REV. 242 (1984). See also SCHERMERS, *supra* note 11, at 390-446.

¹⁴⁹ Case 283/81, *Srl CILFIT v. Ministry of Health*, 1982 E.C.R. 3415 (the leading judgment interpreting the scope and use of Article 177). In response to questions of the Italian Supreme Court, the Court of Justice indicated that national courts may refer questions under Article 177 whenever the questions are relevant to their resolution of a pending proceeding. National courts need not refer questions if "there is no scope for any reasonable doubt" as to their answer. *Id.* ¶ 16.

¹⁵⁰ *Id.* ¶¶ 13-14. However, a national court may raise again a question which the Court of Justice has already answered in a prior case, *id.* ¶ 15, presumably in order to see if the Court might modify significantly the prior answer.

Article 177, the Court of Justice's Community law enunciation supercedes any conflicting national law norm, even one of constitutional law.¹⁵¹

Article 177 in practice has proved to have an astonishing level of success. National courts have increasingly used the reference process, so that in recent years Article 177 proceedings constitute more than half the Court's caseload; on average, over one hundred decisions a year.¹⁵² Although Member State supreme and constitutional courts were initially reluctant to use Article 177, today they are more willing to do so.

The Article 177 procedure has enabled an extraordinary variety of issues to reach the Court of Justice. As former Judge Pierre Pescatore has aptly noted, the Court's most important doctrines were articulated in large measure through its responses to national courts.¹⁵³ Surprisingly, the national courts have generally been quite willing to follow the Court's evolving Community law doctrines, even when the doctrines conflict with national norms. To some degree, this may reflect an informal function of the Court; for many years its Judges have viewed their duties to include frequent participation in national judicial conferences and meetings, where they engage in direct dialogues with their national confreres.

It is indeed probable that the Article 177 reference mechanism has proved more successful than a system of Community trial courts might have been. As it has evolved, the Article 177 approach has achieved a widespread acceptance of Community doctrines at the national court level, in effect making the national judges the allies of the Court of Justice in promoting the development of Community law. A system of Community trial courts might well have created jealousy between the Community and national courts, complicated issues of jurisdiction, and reduced the willingness of national courts to recognize Community law.

¹⁵¹ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629; Case C-213/89, *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, 1990 E.C.R. I-2443.

¹⁵² XXVTH GENERAL REPORT, *supra* note 57, Annexes, Table 2.

¹⁵³ Former Judge Pierre Pescatore of the Court of Justice has said that use of Article 177 has provided the Court with questions enabling its "most conspicuous contribution to the development of Community law . . . [including] the direct effect of Community law, its primacy over national law, the protection of fundamental rights, the principles relating to the common market and the law of competition [and] the social dimension of the Community" PIERRE PESCATORE, REFERENCES FOR PRELIMINARY RULINGS UNDER ARTICLE 177 (1986).

One gap in the Community judicial system is evident. This is the absence of any form of appeal from a court of last resort in a Member State to the Court of Justice. No system of recourse exists, if a court of last resort misapplies Community law without referring to the Court of Justice, or inaccurately applies the Court's answer after such a reference. While admittedly such occasions have been few, they do occur.¹⁵⁴ It seems unfortunate that to date the Member States have not been willing to accept any form of appeal on Community law issues from their supreme courts to the Court of Justice.

Delay in the proceedings in the Court of Justice pose a more pragmatic problem. Because the issues are often complex, and the Commission and Member States frequently intervene to add their views to those of the parties directly involved, the Court's proceedings customarily take one to two years.¹⁵⁵ Such a time delay is perhaps an unfortunate concomitant of any appellate review, and therefore inevitable in Article 173 proceedings. The problem is more acute in Article 177 reference proceedings, because the delay in the Court's response must be added to the length of the national court's own procedures.

In conclusion, the judicial structure of the Community has proved, in general, to be very effective. Each of the principal types of proceedings — those under Articles 169, 173, and 177 — have been more successful than could have been optimistically foreseen in 1958.

The Court of Justice itself has been consistently composed of judges who have not only been competent legal scholars, but have been animated by a pioneering constitutional vision.¹⁵⁶ The Court of Justice has attained an extraordinary degree of respect and deference, both from the other Community institutions and from the Member

¹⁵⁴ Probably the most famous instance occurred when the Conseil d'Etat, the French Supreme Administrative Court, held that a Community directive on the right of residence of migrant workers did not have direct effect, despite well-known Court of Justice case law to the contrary. Judgment of December 22, 1978 (*Ministre de l'Interieur v. Cohn-Bendit*), [1979] *Recueil Dalloz* 155, *translated in* 1 C.M.L.R. 543 (1980). The German Supreme Tax Court came to the same conclusion, citing Cohn-Bendit, in a case involving a value added tax directive, but was reversed by the German Constitutional Court, which held that the Supreme Tax Court was bound by the precedents of the Court of Justice. Judgment of April 8, 1987, *Application of Frau Kloppenburg*, 75 BVerfGE 223, *translated in* 3 C.M.L.R. 1 (1988).

¹⁵⁵ *Statistical information from the Court of Justice and the Court of First Instance*, 17 EUR. L. REV. 189 (1992).

¹⁵⁶ Among those best known for their contributions to the Court's constitutional developments in the 1960s and 1970s were Judges Donner (Dutch), Kutscher (German), Lecourt (French), Lord Mackenzie Stuart (Scottish), Mertens de Wilmars (Belgian), and Pescatore (Luxembourger).

State governments and courts. As was noted earlier, the Court's legal doctrines, particularly those affecting the constitutional structure, have shaped the nature and role of the Community to an extraordinary degree. If the Community can accurately be described as a federal system, substantial credit goes to the Court of Justice's vision.

IV. MAASTRICHT TREATY MODIFICATIONS TO THE COMMUNITY'S SCOPE AND STRUCTURE

Ever since the European Council adopted the Stuttgart Declaration on European Union in 1984, the Community has been animated by a growing movement to achieve greater powers for the central institutions, a higher level of democratic legitimacy, and a broader field of operations. The drafting of the Single European Act represented only a limited step in the achievement of these goals. However, the successful implementation of all the important aspects of the Single European Act and, perhaps even more, the successful execution of most of the legislative program contained in the Commission's 1985 White Paper on Completing the Internal Market, incited renewed efforts to advance the Community toward European Union.

After a certain amount of internal debate, sharpened by the reluctance of the United Kingdom to modify the essential Community structure, the Dublin European Council on June 25-26, 1990 decided to convene two intergovernmental conferences in Rome in December 1990, the first to consider the creation of an economic and monetary union, and the second to review proposals to revise the political structure of the Community.¹⁵⁷ These Rome conferences, held in accordance with the EEC Treaty amendment procedures,¹⁵⁸ labored intensively, often with periods of difficult debate and strong difference of views. The most serious disputes were submitted to the Maastricht European Council on December 9-10, 1991, which, somewhat surprisingly, was able to find compromise solutions for virtually all issues.¹⁵⁹

¹⁵⁷ E.C. Bull. 1990/6, at ¶ 1.35. The agenda for the two conferences was set by a special European Council meeting in Rome in October 1990. E.C. Bull. 1990/10, at ¶ 1.14. For further details on the planning and references to the supportive views of the Commission and the Parliament, see COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH GENERAL REPORT OF THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1990, at 32-36 (1991) [hereinafter XXIVTH GENERAL REPORT].

¹⁵⁸ EEC TREATY, *supra* note 1, art. 236. This article provides that the Council of Ministers may call such an intergovernmental conference to consider amendments, but does not prescribe the vote required. The Council acted despite the reservations of the United Kingdom.

¹⁵⁹ The ongoing conduct of the Rome Intergovernmental Conferences, together with a sum-

The resulting text, which combined amendments of the EEC, ECSC, and Euratom Treaties with entirely new fields of action encompassed under the rubric of European Union, was signed by the Member States on February 7, 1992 in Maastricht as the Treaty on European Union.¹⁶⁰ Ratification was thought to require the rest of 1992,¹⁶¹ but the ratification process has proved far more difficult than anyone had foreseen, particularly after the narrow Danish rejection of the TEU by a 51%-49% margin in a referendum in June 1992.

The successful outcome of the French referendum in September 1992, albeit by an equally narrow margin, has made it likely that the Treaty on European Union will ultimately be ratified by all the Member States (although slightly modified by a Declaration of the December 1992 Edinburgh European Council intended to incite the Danes to vote in favor). The process will certainly take until mid-1993. It is still possible that the United Kingdom Parliament will reject the Treaty, despite its endorsement by Prime Minister Major, and Denmark's second referendum may reach the same result as the first. If rejected by either country, the Maastricht Treaty would either be abandoned or would have to be significantly modified to enable the other Member States to move ahead in a two-tiered Community structure without the United Kingdom, which is not likely, or without Denmark, which is at least within the realm of possibility. However, since the present view is one of guarded optimism that both the United Kingdom and Denmark will eventually ratify the TEU, we will now consider how that would modify the scope and institutional structure described in Parts II and III above.

mary of the principal conclusions after the Maastricht European Council, is described in XXVTH GENERAL REPORT, *supra* note 57, at 5-13. The most important compromises achieved by the Maastricht European Council related to the process of movement toward EMU, and to the Social Protocol, discussed *infra* in the text at note 204. Among the important issues which could not be compromised were those concerning the number of members of the Commission and of the Parliament, both matters intended for further review. See TEU, *supra* note 2, Declaration 15 on the number of members of the Commission and of the European Parliament. The proposal to give Germany eighteen additional members of Parliament, in view of its greater population since reunification, was particularly sensitive, because it would end the even balance of representation among France, Germany, Italy, and the United Kingdom. The December 1992 Edinburgh European Council has now decided that Germany should have eighteen additional members of Parliament.

¹⁶⁰ TEU, *supra* note 2.

¹⁶¹ The TEU foresaw the completion of ratification before January 1, 1993. TEU, *supra* note 2, art. R(2). Since that date has proved to be too optimistic, the TEU will enter into effect on the first day of the month following deposit of the instrument of ratification by the last signatory state. *Id.*

A. *The Scope of the European Union After Maastricht*

The TEU is intended to substantially augment the powers of the European Community. The Preamble refers to it as a "new stage in the process of European integration,"¹⁶² while Article A formally describes the supranational structure being created as the "European Union," or simply "the Union." This structure is founded on the prior Communities but has new institutional aspects and fields of operation. As noted at the outset of this essay, the word "federal" was not used to modify the word "Union," but the Community's structure as modified by the TEU certainly has enhanced federal characteristics.¹⁶³

Trying to understand the structure and scope of the new European Union is quite a task, because the TEU mixes articles setting out modifications in the present European Community with articles describing new and somewhat separate institutions and operations. The TEU is further complicated, because much of the text reflects compromises. Accordingly, initial broad statements are then modified by limitative ones. The very complexity of the TEU has undoubtedly hampered the ratification process, because it is much easier to point to language that appears adverse to particular interest groups, than to describe the over-all new features that are beneficial.

Simplifying greatly, we will briefly describe the four principal aspects of the European Union, and then note the modifications in scope made in the present European Community.

The creation of an EMU has received the principal attention in commentary on the TEU. In fact, economic and monetary coordination was a feature, albeit a secondary one, of the EEC Treaty.¹⁶⁴ Community monetary coordination efforts became substantial after the breakdown of the Bretton Wood international fixed-exchange rate monetary structure in 1969. After a period of crises in the 1970s, the Community succeeded in creating the European Monetary System in 1979,¹⁶⁵ even though the United Kingdom and several other Member

¹⁶² TEU, *supra* note 2. Two excellent analyses of the effect of the TEU are Everling, *supra* note 12, and John Pinder, *The Community after Maastricht: How Federal?*, 5 N. EUR. Q. REV. 5 (1992).

¹⁶³ The Commission tersely observed that "the federal nature of the union was not highlighted at Maastricht." XXVTH GENERAL REPORT, *supra* note 57, at 12.

¹⁶⁴ EEC TREATY, *supra* note 1, arts. 103-109. An important advisory body is the Monetary Committee, which was created to work toward economic and monetary policy coordination. *Id.* art. 105(2). This Committee's work has been supplemented since 1964 by the Committee of Governors of Central Banks.

¹⁶⁵ The EMS was created after a policy decision taken at the European Council meeting at

States, decided not to participate in its system of quasi-fixed rates (the Exchange Rate Mechanism, or ERM) until 1990 or later.

Buoyed by the success of the internal market program, new efforts to develop an EMU were launched. In April 1989, a committee, chaired by President Delors and composed principally of national central bank representatives, presented a report outlining the proposed features of an EMU and setting forth concrete stages of action to attain it.¹⁶⁶ This Delors Report, together with further Commission and Member State proposals, provided the grist for the mill during the Rome Intergovernmental Conference review.¹⁶⁷

The TEU provisions on the EMU, supplemented by Protocols, are extremely complicated. They provide for three successive stages in monetary coordination,¹⁶⁸ marked by the elimination of exchange regulations,¹⁶⁹ better control of deficit spending, inflation rates, and interest rates by Member States,¹⁷⁰ and the progressive development of monetary institutions, notably the European System of Central Banks (ESCB) and a European Central Bank (ECB),¹⁷¹ molded largely on the U.S. Federal Reserve Board model. The ultimate goal is not only a system of monetary stability monitored and regulated by

Bremen in August 1978. E.C. Bull. 1978/6, at 17-18. For a description of the EMS, see BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 35B. For additional detail, see THE EMS, *supra* note 83.

¹⁶⁶ The Delors Committee Report, available from the Commission Information Service, is summarized in E.C. Bull. 1989/4, at 8-9. It is commented upon in Jean-Victor Louis, *A Monetary Union for Tomorrow?*, 26 COMMON MKT. L. REV. 301 (1989).

¹⁶⁷ See XXVTH GENERAL REPORT, *supra* note 57, at 6-9.

¹⁶⁸ The Community is already in the first stage and is scheduled to start the second stage on January 1, 1994. EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 109e. The third stage, including its monetary coordination goal of a single currency, is scheduled to begin by January 1, 1999. *Id.* at art. 109j(4).

¹⁶⁹ This was largely achieved by a major directive in 1988 which required the abolition of Member State exchange controls and other restrictions on the free movement of capital by July 1, 1990. Temporary derogations were permitted until 1993 for Spain and Portugal, and until 1995 for Greece and Ireland. Council Directive 88/361, 1988 O.J. (L 178) 5. The EEC Treaty, as amended by the TEU, would generally prohibit any intra-Community restrictions on the free movement of capital. EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 73. See generally, Andrew Gamble, *EMU and European Capital Markets: Towards a Unified Financial Market*, 28 COMMON MKT. L. REV. 319 (1991).

¹⁷⁰ The TEU and related Protocols set up precise goals for all three items to be attained by Member States during the second stage. Achievement of these goals is a condition for moving to the third stage. EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, arts. 104 and 109j.

¹⁷¹ The nature, rules, and operations of the ESCB and the ECB are described in EEC TREATY, *supra* note 1, as amended by TEU, arts. 105-109, together with related Protocols. See generally Hugo J. Hahn, *The European Central Bank: Key to European Monetary Union or Target?*, 28 COMMON MKT. L. REV. 783 (1991).

the ESCB and ECB, but also a single European currency, to be set in place no later than January 1, 1999.¹⁷²

The TEU monetary provisions expressly provide for a two-tier Europe. Member States which satisfy prescribed conditions of monetary stability will move to the final stage and the adoption of a European currency, while other States remain outside the system pending their attainment of the prescribed conditions.

Manifestly, the attainment of an EMU, particularly one marked by a single European currency, would have tremendous political and social implications well beyond its economic and monetary features. One of the most sensitive aspects of political governance is control of the national budget, finances, and fundamental economic policy. The creation of an EMU would mean the transfer of a vast power in these spheres from Member State governments to the Union. This would mean a very palpable transfer of sovereignty to the Council of Ministers, and to the new ESCB and ECB.

During the ratification debates, no other aspect of the TEU has proved more controversial. As an essential compromise during the Maastricht European Council, the United Kingdom was given a specific right to opt out of participation in the final stage of an EMU and the European currency.¹⁷³ The December 1992 Edinburgh Council has now issued a Declaration giving Denmark the same right, in order to induce it to ratify the TEU.¹⁷⁴

Moreover, the monetary crisis of September 1992, has shattered, at least temporarily, the EMS. This crisis was provoked in some measure by fear that the French would not ratify the TEU, but it was caused fundamentally by the sharp divergence in monetary policies between Germany, which maintained high interest rates to combat inflation after German unification, and the United Kingdom and most other Member States, which needed low interest rates and deficits to combat recession. In view of the likely inability to achieve a convergence of monetary policies between Germany and other Member States, the progress toward an eventual EMU is certain to be slower and far less effective. Even if the TEU is ratified, its monetary provisions are unlikely to be carried out within the foreseen time frame. Whether the Union can ever attain a strong functional central bank

¹⁷² EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 109j(4).

¹⁷³ The UK has "no obligation" to move to the third stage of the EMU. TEU, *supra* note 2, Protocol on Certain Provisions Relating to the United Kingdom, par. 1.

¹⁷⁴ See *infra* note 285.

system with the ECB working within the ESCB, and a single currency, is very much open to doubt.

The second major aspect of the Union is the proposed foreign policy and security coordination. Building on the European Political Cooperation (EPC) system of coordination of foreign policy that presently exists,¹⁷⁵ Article J of the TEU provides for a closer mode of coordination on foreign policy and expands it to include security policy.¹⁷⁶ The detailed provisions would enable for the first time the taking of certain foreign policy decisions by qualified majority voting, eliminating the present need to attain a consensus on all issues.¹⁷⁷

Certainly, if the TEU does result in a functional system of foreign and security policy coordination on the basis of qualified majority voting, with the outvoted States loyally abiding by the decision taken, this would represent a significant transfer of sovereignty to the Union in a very sensitive area.

Unfortunately, although it is still within the realm of possibility that the TEU provisions in this sector may still be implemented after ratification, the auguries at present are unfavorable. The civil war in the former Yugoslavia, and particularly the bitter fighting in Bosnia-Herzegovina, has posed an acute crisis in the present EPC decision making. The Member States have not been able to reach a consensus on how strongly to react to the aggression of Serbian militias, supported by the former Yugoslav government. They had great difficulty in deciding when to recognize Slovenia and Croatia as independent republics and have not been able to achieve a consensus to recognize Macedonia as of this writing.¹⁷⁸ As for security coordination, the Member States presently have no mechanism to field a security force to intervene in the Bosnian conflict, and it may be seriously doubted

¹⁷⁵ SEA, *supra* note 6, Title III. See *supra* note 82.

¹⁷⁶ Member States are required to "define and implement a common foreign and security policy." TEU, *supra* note 2, art. J.1. "[C]ommon positions" agreed upon by the Council, in accord with guidelines from the European Council, pursuant to article J.8, are binding upon Member States. *Id.* art. J.2. Where security policy requires a "common defence policy," the Western European Union is to provide a mechanism for action. *Id.* art. J.2.

¹⁷⁷ TEU, *supra* note 2, art. J.3.

¹⁷⁸ It is generally believed that Germany's expressed intent to recognize Croatia and Slovenia placed pressure on more reluctant Member States to adopt a common policy of recognition in the spring of 1992. Macedonia has still not been recognized due to Greece's opposition to that republic's adoption of the name, "Macedonia," because "Macedonia" is also the name of a northern region of Greece. This has prevented the Council of Foreign Ministers from attaining unanimity. Eduardo Cue, *EC Shuns "Rump" Yugoslavia*, CHRISTIAN SCIENCE MONITOR, May 4, 1992, at 2.

that they would be able to agree upon such a force, even if the TEU's Article J were in effect.

The TEU's Article K on Cooperation in Justice and Home Affairs represents another new sector for the Union. Article K enables cooperative action in the fields of a common immigration policy and system of visas, a common asylum policy, and the coordination of police action against terrorism, drug-dealing, and international fraud or other crimes.¹⁷⁹ Moreover, the EEC Treaty would be amended to permit legislation to attain a common visa policy.¹⁸⁰ After January 1, 1996 such legislation could be adopted by a qualified majority.¹⁸¹

Implementation of Article K would fill a serious gap in present Community law. Although the Commission's 1985 White Paper characterized the border controls of physical persons at national frontiers as one of the most evident symbols of division in the Community,¹⁸² only limited progress has been made to eliminate these controls. Member States, notably the United Kingdom, have expressed concern that ending frontier controls would hamper the combat of terrorism and drug traffic, and hence would pose an unacceptable security risk.¹⁸³

Article K, coupled with the EEC Treaty Article 100c, might enable significant progress through the attainment of harmonized visa and asylum measures and through significant levels of Justice Ministry and police cooperation. Unfortunately, again the auguries are not promising. The ratification debates and political problems, notably in France, Germany, and the United Kingdom, have revealed the strong opposition of large groups to any Community or Union measures that

¹⁷⁹ Article K deliberately uses the word "cooperation" rather than "harmonization" and enables only a limited degree of joint decision. TEU, *supra* note 2, art. K.

¹⁸⁰ EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 100c.

¹⁸¹ *Id.* at 100c(3). By unanimous vote, the Council may expand the legislative scope of Article 100c to include general immigration policy, asylum policy, and measures to combat drug-dealing and international fraud. TEU, *supra* note 2, art. K.9.

¹⁸² The White Paper called for the end of routine control of physical persons at intra-Community frontiers because these are "to the ordinary citizen . . . the obvious manifestation of the continued division of the Community." White Paper, *supra* note 54, ¶ 24. As part of its "People's Europe" Program, the European Council urged Community action for the "abolition of all police and customs formalities for people crossing intra-Community frontiers." E.C. Bull. 1985/7 Supp., at 104. For a brief description of the People's Europe Program and the border control issue, see BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, ch. 14A.

¹⁸³ Because implementing legislation for the entire Community has been blocked, most of the Member States have entered into the Schengen Accord to end frontier-crossing controls, harmonize visa requirements, and cooperate on drug and terrorism control. Even this Accord has not yet been ratified by their parliaments. See Julian J. E. Schutte, *Schengen: Its Meaning for the Free Movement of Persons in Europe*, 28 COMMON MKT. L. REV. 549 (1991).

would reduce national control of immigration, visa or asylum policies. It is likely that the pace of progress in this sphere will be slow indeed.

The final important aspect of the Union is the creation of the status of citizenship of the Union.¹⁸⁴ Every Union citizen, defined in terms of each Member State's recognition of the status of a national of that State, would have the right to "move and reside freely" anywhere in the Community. This goes further than the present EEC Treaty's recognition of such rights for workers and the self-employed.¹⁸⁵

Another aspect of citizenship would have considerable symbolic value. Citizens of the Union would be permitted to vote and to be candidates for office in municipal elections in any Member State in which they are resident, even though they are nationals of another Member State.¹⁸⁶ In like manner, they would be entitled to vote for members of the European Parliament in their State of residence. Legislative proposals to achieve this result were initially made in 1989 as part of the People's Europe Program,¹⁸⁷ but have not advanced significantly to date. Manifestly, ending the customary restriction on voting to a Member State's own nationals has great supranational symbolism. It fosters the creation of a sense of citizenship in the federal, or supranational, Union. However, this provision has generated considerable opposition to the TEU during the ratification process.

Finally, the TEU would amend the EEC Treaty to add, at least formally, several spheres of action. The TEU would add consumer protection,¹⁸⁸ a purely formal addition, since the Community has had an extensive consumer protection legislative program since 1975, making use of its general harmonization of laws powers.¹⁸⁹ More consequential are the additions of education, culture and public health as

¹⁸⁴ Stated as a principle in Article B and provided for specifically in an EEC Treaty amendment, a new Article 8. The present famous Article 8a on completing the internal market would be renumbered as Article 7a.

¹⁸⁵ The legislation cited in note 98 *supra* would largely achieve a right of residence for all Community nationals, but the TEU provision would, of course, have Treaty force and represent a new fundamental right.

¹⁸⁶ TEU, *supra* note 2, art. 8b.

¹⁸⁷ Amended Commission Proposal for a Council Directive on voting rights for Community nationals in local elections in their Member State of residence, 1989 O.J. (C 290) 1. Part of the delay is due to the fact that at least half of the Member States must amend their constitutions to permit non-nationals to vote.

¹⁸⁸ TEU, *supra* note 2, art. 129a.

¹⁸⁹ See Council Resolution of April 14, 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C 92) 2.

Community fields of action.¹⁹⁰ Although the Community has adopted limited measures in these fields as ancillary to present fields of action, such as measures concerning the education of migrant workers' children,¹⁹¹ or the Erasmus program to encourage cross-border studies and research in higher education,¹⁹² the TEU amendments would considerably extend the scope of Community initiatives.

To sum up, the TEU, if ratified, would substantially expand the spheres of present Community activity, in particular by its creation of an economic and monetary union. The powers that would be granted to the Union to coordinate foreign and security policy, as well as those to coordinate immigration policy and police action against drug traffic and terrorism, are also highly important. The creation of the concept and sense of citizenship of the Union should not be underestimated.

The difficulties in ratification, and the complications caused by sharp differences in monetary policy between Germany and other States, have certainly demonstrated that the use which is apt to be made of the new powers by the Union and the Community may be quite limited, especially in the near term. It is unlikely that the goal of an EMU will be met by 1999 and quite possible that the TEU provisions will be further amended, or not implemented, so that an EMU, if achieved, will be significantly different from the current proposals.

Moreover, the TEU added a new principle of operation in its enunciation of the concept of subsidiarity in a new EEC Treaty Article 3b. This article states essentially that the Community should not undertake action within its sphere of powers if measures can be more effectively or appropriately taken at the Member State level.¹⁹³ This principle of subsidiarity was first enunciated in the SEA's extension of Community action to the sphere of environmental protection.¹⁹⁴ The doctrine will now apply to all Treaty fields of action.

What precisely is meant by subsidiarity, and how the concept should be applied in particular instances, are both issues generating

¹⁹⁰ EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, arts. 126, 128 and 129, respectively.

¹⁹¹ Council Directive 77/486, 1977 O.J. (L 199) 32.

¹⁹² Council Decision 87/327, 1987 O.J. (L 166) 20. When challenged, the Erasmus program was upheld as an appropriate exercise of Council legislative power largely under Article 128 on vocational training. Case 242/87, *Commission v. Council (Erasmus)*, 1989 E.C.R. 1425.

¹⁹³ TEU, *supra* note 2, art. 3b.

¹⁹⁴ EEC Treaty, *supra* note 1, art. 130r(4).

intense debate and considerable uncertainty.¹⁹⁵ The ratification debates have demonstrated that the concept of subsidiarity has great appeal to political leaders and the population at large in several Member States, not surprisingly including the UK. The concept is likely to receive substantial application in practice. If so, this might mean a reduction of the volume of future Community legislation.

B. *The Institutional Structure After Maastricht*

The Maastricht Treaty would make several important changes in Community structure, all accentuating its federal or supranational character. Paralleling the presentation in Part III, we will initially discuss the legislative process, then administrative powers, and finally judicial authority.

The best known change in the legislative process produced by the TEU would be the creation of a new legislative mode enhancing the powers of Parliament, called the co-decision process.¹⁹⁶ The co-decision process is even more complicated than parliamentary cooperation.

The co-decision process has two essential features. First, if the Council and Parliament are unable to agree upon the text of legislation when Parliament has proposed amendments to the Council draft, then a Conciliation Committee representing the two bodies will intervene in an effort to achieve a compromise. The role of the Conciliation Committee would be not unlike the role of Conference Committees of the Senate and the House of Representatives in the United States. The Conciliation Committee would not be able to bind either body, but could be expected to influence strongly the shape of any legislation eventually adopted.

Second, if the Council and Parliament are unable to reach a compromise, then the Parliament could veto the legislation. The veto power would not be absolute, however, because the Council could vote a final time in favor of its text, which would be adopted unless the Parliament voted against the Council proposal by an absolute ma-

¹⁹⁵ For an able appraisal, see Deborah Z. Cass, *The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 *COMMON MKT. L. REV.* 1107 (1992). The December 1992 Edinburgh Council issued guidelines for the interpretation of the principle of subsidiarity. The text is not yet published in the E.C. Bulletin, but is available from the Commission Information Service.

¹⁹⁶ TEU, *supra* note 2, art. 189b. See generally BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, at 89-90.

jority—a negative vote which clearly would not always be easy to attain.

The new co-decision process would be applied to a substantial volume of legislation, most notably harmonization to achieve the internal market,¹⁹⁷ as well as the measures to achieve the free movement of workers or the right of establishment,¹⁹⁸ and measures in the new fields of action, namely, education, culture, public health, and consumer protection.¹⁹⁹

The parliamentary cooperation process would not be totally supplanted by co-decision, but would continue for certain fields, such as worker health and safety legislation,²⁰⁰ and will cover new areas, such as most environmental protection measures,²⁰¹ and vocational training.²⁰²

The supranational character of the legislative process would be further enhanced because the Council would be able to adopt a greater volume of legislation by qualified majority vote, instead of unanimity. Thus, the TEU would permit action by qualified majority vote on most environmental protection measures,²⁰³ and on measures in the fields of education, public health, and consumer protection.

A peculiar variant would arise through the operation of the famous (or infamous) Social Protocol, annexed to the TEU. Because all the other States wanted to permit qualified majority legislation in the social policy, or employee rights field, while the United Kingdom steadfastly opposed this, the Protocol would enable the other eleven States to take social action measures binding themselves, but not the UK, by a type of qualified majority vote calculated without the UK weighted vote component.²⁰⁴ This curious compromise would establish a two-tier Community in social legislation.

Thus, in sum, the legislative system of the Community as modified by the TEU would significantly enhance the federal, or supranational, character of the Community, both by enlarging the role of the

¹⁹⁷ TEU, *supra* note 2, art. 100a.

¹⁹⁸ *Id.* arts. 49 and 54.

¹⁹⁹ *Id.* arts. 126, 128, 129 and 129a.

²⁰⁰ *Id.* art. 118a.

²⁰¹ *Id.* art. 130s.

²⁰² *Id.* art. 127.

²⁰³ *Id.* art. 130s.

²⁰⁴ The Protocol provides for action by a special weighted vote of 44. TEU, *supra* note 2. An annexed Agreement on Social Policy describes the intended fields of action and mandates a unanimous vote, instead of a qualified majority, for a few of the fields. TEU, *supra* note 2, annexed Agreement on Social Policy, art. 2(3).

Parliament, which represents a popular mandate independent of the Member States, and by reducing the number of legislative actions which require unanimous Council votes.

Turning next to the administrative and executive powers of the Community, the TEU would make certain modifications in the direction of greater central authority, but the changes may turn out to be more symbolic than real.

First, the Commission structure would be changed by the TEU. The President of the Commission would be chosen by the Member States initially, and then he or she would be consulted during the selection of the other Commissioners.²⁰⁵ Further, there would be only one or two Vice-presidents, instead of the present six, and they would be designated by the Commission itself.²⁰⁶

The apparent purpose of these changes is to enhance the role and authority of the President and the Vice-president(s). The TEU takes a small step in the direction of vesting the President of the Commission with a status similar to that of a Prime Minister, with the other Commissioners acting more as cabinet members. It remains to be seen whether the symbolism of the prior choice of the President will translate into any additional customary authority.

Another significant change is that the Commission's term of office would be extended to five years,²⁰⁷ in order to be coterminous with the mandate of the Parliament.²⁰⁸ Each newly designated Commission would be subject to a "vote of approval" by the Parliament before taking office.²⁰⁹ The apparent purpose of these changes is to make the Commission-Parliament relationship begin to approximate the relationship between a national prime minister and a national parliament. Again, it remains to be seen whether these largely symbolic changes will produce any genuine political effect.

The TEU would not change the role of the Council, but it would, for the first time, state the role of the European Council. Article D states that the "European Council shall provide the Union with the necessary impetus for its development and shall define the general

²⁰⁵ TEU, *supra* note 2, art. 158.

²⁰⁶ *Id.*, art. 161.

²⁰⁷ *Id.* art. 158(1).

²⁰⁸ The five-year term system would begin on January 7, 1995, in order to parallel the term of the Parliament elected in 1994. For this reason, the Commission designated to take office in January 1993 will serve only a two-year term. EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 158(3).

²⁰⁹ TEU, *supra* note 2, art. 158(2).

political guidelines thereof.”²¹⁰ While this merely describes what the European Council has always done in practice, its statement as Treaty language lends a legal character to the role of the European Council. It is noteworthy that the European Council must take critically important decisions in the evolution of the EMU, and in the development of a common foreign and security policy, as a precondition for Council action.²¹¹

Thus, in terms of administrative and executive powers, the TEU has not made any drastic changes. The modifications made may over time accentuate the executive power of the European Council, as well as that of the Commission President, but it is certainly possible that these changes will have only a minor symbolic effect.

Finally, as to judicial authority, the TEU made virtually no significant changes. The Maastricht Treaty does not, for example, create any form of Community district courts, nor does it provide for appellate appeal from Member State supreme courts to the Court of Justice.

The TEU does facilitate the work of the Court of Justice slightly in several regards. First, it permits the Court to sit in chambers rather than in plenary session to a greater degree.²¹² Second, it authorizes a broader Council delegation of types of proceedings to the Court of First Instance.²¹³ Finally, in proceedings under Article 171 against Member States which have failed to comply with judgments rendered under Article 169, the Commission may request, and the Court may award, penalties.²¹⁴

In summary, the principal effect of the Maastricht Treaty on the institutional structure of the Community would be to modify the legislative process in a manner which augments the powers of the Parliament and which increases qualified majority decision-making by the Council. On the whole, the Maastricht Treaty would not increase

²¹⁰ *Id.* art. D.

²¹¹ The European Council must decide when and how to move forward to the third stage of the EMU. EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 109j(3) and (4). The European Council must supply guidelines to the Council before the Council can take any “joint action” in foreign or security policy. TEU, *supra* note 2, art. J.3(1).

²¹² The Court need only sit in plenary session when requested by a Member State or a Commission institution that is party to the suit. EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 165.

²¹³ EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 168a. The only type of proceedings that the Council cannot assign to the Court of First Instance will be the answers to preliminary questions raised by national courts under Article 177.

²¹⁴ EEC TREATY, *supra* note 1, as amended by TEU, *supra* note 2, art. 171(2).

ing internal problems, little attention has been given to the drafting of proposals for a federal structure.

Therefore, from a practical point of view, the principal interest which central and eastern European states presently have in the European Community as a type of federal system lies in their desire, in the medium or long term, in themselves becoming Member States, or at least becoming closely linked to the Community.

During the period of consideration of the proposals that became the Maastricht Treaty, the Community also had to confront the issues involved in a possible expansion to include new Member States or, alternatively, to develop closer relations with the other European states, whether in the EFTA and in eastern Europe. This possible expansion process is commonly designated the "widening" of the Community, in distinction to the addition of new fields of action and the augmentation of central authority produced by the Maastricht Treaty, referred to as the "deepening" of the Community.

To what extent and in what manner the Community's relations with central and eastern European states should be intensified is an important issue within the overall examination of the widening of the Community. The final part of this article will review the Community's current relations with central and eastern Europe and then consider how these relations might develop into either the accession of certain states to the Community or into an alternative but still intimate relationship.

A. *Present Community Relations with Eastern Europe*

During the post-World War II period of Communist domination of the Soviet Union and the eastern European states, trade relations between the European Community and these states remained at a relatively low level. Until the 1980s, no preferential trade agreements existed, except with Yugoslavia, after President Tito removed his country from the Soviet Bloc. Many eastern European products were subject to quotas and the Community frequently took protective trade action in the form of anti-dumping and anti-subsidy proceedings against eastern European states.

Although trade discussions did begin in 1977 between the Community and the Soviet bloc's Council for Mutual Economic Assistance (Comecon), grouping ten eastern European states in a trade zone, the first significant breakthrough occurred on June 25, 1988, when the Community and Comecon signed a Joint Declaration for

dramatically the powers of the Community central governing bodies at the expense of the Member States. Like the changes inaugurated by the Single European Act, the modifications made by the Maastricht Treaty move the Community only gradually towards a more federal or supranational union.

V. THE WIDENING OF THE COMMUNITY: ITS RELATIONS WITH EASTERN EUROPE

A year or two ago, there was some feeling that the European Community's economic federalism, a looser structure than the more centrally-oriented federal forms in the United States, Canada or Germany, might serve as a suitable model for certain eastern European states in their transition from marxism to democratic liberalism. Although federalism represented no particular interest to traditionally unitarian states such as Hungary, Poland, and Romania, the loose federalism of the European Community might have served as a model for the Czech and Slovak Republic, Yugoslavia, or the new Commonwealth of Independent States. Unfortunately, this seems unlikely at the present time.

The most likely candidate for a looser form of federalism appeared to be the Czech and Slovak Republic, where some political leaders made great efforts to devise a federalist structure to keep the two states together.²¹⁵ The pressure for total autonomy for the Slovak people proved too strong, however, and the Czech Republic and Slovakia are now destined for separate sovereign status, with only limited preferential rights for the free movement of persons and the free flow of trade and commerce between the two states.

The tragic breakdown of Yugoslavia, not only into separate component states, but states engaged in a bloody civil war, leaves little room for hope of an eventual federal structure. Conceivably Croatia and Slovenia may in the future enter into a federal relationship, but this is highly speculative. As for the Commonwealth of Independent States which presently groups most, but not all, of the former component parts of the Soviet Union, this presently appears likely to evolve into a very loose structure. Given the preoccupation of the Russian Republic, the Ukraine, Kazakhstan, and other states with their press-

²¹⁵ Careful analyses of the federal constitutional structure initially devised for the Czech and Slovak Republic are contained in Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 516 (1991) and Eric Stein, *Devolution or Deconstruction Czecho-Slovak Style*, 13 MICH. J. INT'L L. 786 (1992).

the promotion of trade relations.²¹⁶ This Joint Declaration permitted negotiations for agreements with specific countries, resulting in trade agreements with Czechoslovakia and Hungary in 1988, with Poland and the Soviet Union in 1989, and Bulgaria in 1990.²¹⁷

As the Communist bloc disintegrated in 1989 and 1990, giving way to new democratic regimes, these trade agreements took on increased importance. The agreements essentially require the Community to reduce or eliminate quotas on agricultural and commercial products, and obligate both sides to take measures to liberalize and promote trade. Agreements of a similar character have more recently been signed between the European Community and Romania in 1991,²¹⁸ and Albania, Estonia, Latvia, and Lithuania in 1992.²¹⁹

Even more important than these trade agreements as a means of providing support for the new democratic governments has been the Community's program of economic aid and general assistance. Since the first two central European states to throw off the marxist hegemony and to install democratic governments were Hungary and Poland, the Community aid program began with these countries in early 1989. This program was designated Phare, combining an acronym for Poland and Hungary Assistance for Economic Restructuring with a poetic reference, since "*phare*" means lighthouse in French.

The Group of Seven leading industrial powers (G-7) at its sum-

²¹⁶ Joint Declaration, 1988 O.J. (L 157) 35.

²¹⁷ The trade agreements with Czechoslovakia and Hungary are discussed in the XXIND GENERAL REPORT, *supra* note 100, ¶¶ 905-6, with Poland in COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIRD GENERAL REPORT OF THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1989, at ¶ 790 (1990) [hereinafter XXIIIRD GENERAL REPORT], and with Bulgaria and the Soviet Union in the XXIVTH GENERAL REPORT, *supra* note 157, ¶¶ 675 and 684. The trade agreement with Hungary, which has largely been the model for the later agreements, is found in Council Decision 88/595, 1988 O.J. (L 327) 1. For reviews of the trade and economic assistance arrangements between the Community and eastern Europe during this period of transition in 1988-90, see Dan Horowitz, *EC-Central/East European Relations: New Principles for a New Era*, 27 COMMON MKT. L. REV. 259 (1990); David Kennedy & David E. Webb, *Integration: Eastern Europe and the European Economic Communities*, 28 COLUM. J. TRANS-NAT'L L. 633 (1990); Susan Senior Nello, *Some Recent Developments in EC-East European Economic Relations*, 24 J. WORLD TRADE L. 5 (1990).

²¹⁸ The Romanian trade agreement was signed in October 1990 but formally concluded in March 1991. Council Decision 91/159, 1991 O.J. (L 79) 12. See the comments in XXVTH GENERAL REPORT, *supra* note 57, ¶¶ 821 and 839.

²¹⁹ COMMISSION OF THE EUROPEAN COMMUNITIES, XXVITH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1992, ¶ 747 (1993) [hereinafter XXVITH GENERAL REPORT]. The agreement with Albania is in Council Decision 92/600, 1992 O.J. (L 343) 1; with Estonia in Council Decision 92/601, 1992 O.J. (L 403) 1; with Latvia in Council Decision 92/602, 1992 O.J. (L 403) 10; and with Lithuania in Council Decision 92/603, 1992 O.J. (L 403) 19.

mit meeting in Paris in July 1989 charged the Community with the primary responsibility of arranging and coordinating aid to the fledgling democracies of central Europe. The Phare program represented the Community's initial action in accord with this responsibility. In its first stage, the program provided financial aid and economic, environmental, and technical assistance to Hungary and Poland in order to help sustain their political and economic reforms.²²⁰ In May 1990, the Community expanded Phare to cover Bulgaria, Czechoslovakia, the German Democratic Republic (prior to its unification with West Germany in December 1990), Romania, and Yugoslavia.²²¹ Phare was extended to the Baltic states in 1991.²²²

The Phare program has provided millions of dollars of financial aid earmarked for specific projects, including emergency food aid, modernization of infrastructure in transport and telecommunications, pollution control and environmental protection, quantitative and qualitative improvement of agricultural production, training of personnel in the banking and securities fields as well as aid to designated privatization projects.²²³ Phare is widely considered to be a success, but nonetheless only a partial one, because Community budgetary constraints naturally limit the total amount of any financial aid package.

Phare was soon supplemented by inter-university cooperation and vocational training programs. The Community's highly successful Erasmus program to promote academic exchange and inter-institutional research among faculty and students of Community universities²²⁴ was expanded to include selected countries in central Europe, beginning with Hungary and Poland. This Trans-European Mobility Program for University Studies (Tempus) commenced in 1990.²²⁵

The inherent budgetary limits on financial aid led the European

²²⁰ Council Regulation 89/3906 on economic aid to Hungary and Poland, 1989 O.J. (L 375) 11. See also the description in XXIIIRD GENERAL REPORT, *supra* note 217, ¶ 786.

²²¹ XXIVTH GENERAL REPORT, *supra* note 157, ¶¶ 668-70.

²²² XXVTH GENERAL REPORT, *supra* note 57, ¶ 831.

²²³ 785 million ECU was allocated to Phare in 1991, *id.* ¶ 810, and one billion ECU in 1992, XXVITH GENERAL REPORT, *supra* note 219, ¶¶ 756-58. The Phare program is described in a booklet, COMMISSION OF THE EUROPEAN COMMUNITIES, PHARE—ASSISTANCE FOR ECONOMIC RESTRUCTURING IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE (1992). See also Kennedy & Webb, *supra* note 217, at 648-52.

²²⁴ See *supra* note 192.

²²⁵ The purpose of the Tempus program is set forth in E.C. Bull. 1990-1/2, at 71-72. The Council authorized a European Training Foundation to carry out the Tempus program in Council Regulation 90/1360, 1990 O.J. (L 131) 1. In 1992, the Tempus program consisted of

Community, the United States, and other states to create a new mechanism for assistance to central and eastern Europe, namely the European Bank for Reconstruction and Development (EBRD). President Mitterand of France made the initial proposal for such a bank in an address to the European Parliament in October 1989. The European Council meeting in Strassbourg in December 1989 endorsed the idea,²²⁶ and planning moved forward with unusual rapidity. The Agreement creating the EBRD was signed on May 29, 1990.²²⁷

The EBRD, although principally a Community initiative, is comprised of forty shareholder states, together with the European Community.²²⁸ The Community and its twelve Member States together contributed fifty-one percent of the ten billion ECU capital of the bank. The U.S. is also an important shareholder, contributing ten percent, with other leading commercial states and the eastern European states themselves contributing the remainder. The EBRD's headquarters is London. Its first President is Jacques Attali, formerly a financial advisor to President Mitterand.

The EBRD began operations in April 1991 and, by the end of 1992, it was providing substantial financial support for a variety of projects in central and eastern Europe.²²⁹ Principally, the bank provides long-term loans, financial guarantees, and commercial performance bonds for infrastructure modernization, environmental protection and pollution control projects, and efforts to privatize industrial and commercial operations. Moreover, the EBRD provides technical assistance in the conception and structuring of such projects, a vitally important role given the limited number of qualified financial and commercial personnel in eastern European governments and in the private sector.

In addition to the Phare program and the operations of the EBRD, the Community has granted substantial amounts of medium term financial assistance to specific central and eastern European states. Thus, in 1991, the Community made loans of 375 million ECU to Czechoslovakia, 290 million ECU to Bulgaria, 375 million

637 projects involving more than 10,000 teachers and 6,400 students. XXVITH GENERAL REPORT, *supra* note 219, ¶ 426.

²²⁶ XXIVTH GENERAL REPORT, *supra* note 157, ¶ 54.

²²⁷ *Id.* The Council Decision on the Bank's Articles of Agreement is at Council Decision 90/674, 1990 O.J. (L 372) 1.

²²⁸ The legal structure and proposed operations of the EBRD are described in D.R.R. Dunnett, *The European Bank for Reconstruction and Development: A Legal Survey*, 28 COMMON MKT. L. REV. 571 (1991).

²²⁹ XXVITH GENERAL REPORT, *supra* note 219, ¶¶ 44-47.

ECU to Romania, and 180 million ECU to Hungary.²³⁰ In 1992, the Community continued its medium-term financial aid policy by granting a 1.25 billion ECU loan to Russia and other former Soviet states, as well as 480 million ECU to Albania, Bulgaria, Romania, and the Baltic states.²³¹

B. *The Europe Agreements*

In 1990-1991, Czechoslovakia, Hungary, Poland and, to a lesser degree, other central European states made rapid progress in the rebuilding of democratic institutions. Their progress in dismantling their state-controlled economies and establishing economic liberalism and privatization of industry and agriculture was more limited, but still definite. The Commission and the leaders of the Member States, acting through the European Council, determined that it was time to move toward a more intimate relationship with the central European states that had made the most progress.

For their part, Czechoslovakia, Hungary, and Poland all expressed a desire to achieve full membership in the European Community as soon as possible, and to attain the closest practicable economic relations in the meantime. This aspiration is shared by some political leaders in the Baltic states, Bulgaria, Romania, and Slovenia.

The Community accordingly decided to adapt its system of association agreements into a form suitable for a new stage in relations with central and eastern Europe. Association agreements, provided for in Article 238 of the EEC Treaty, are intended to facilitate preferential trade arrangements, mutual investment rights, technical and developmental aid, and, in some cases, rights of free movement and residence for migrant workers. The first association agreements were with Greece in 1961 and Turkey in 1963, and both agreements foresaw the possibility that each state might eventually join the Community.

During the 1960s and 1970s, the Community expanded its network of association agreements to include virtually all Mediterranean states: Morocco, Algeria, Tunisia, Egypt, Israel, Lebanon, Syria, Cyprus, and Malta.²³² The agreements generally follow the above-indi-

²³⁰ XXVTH GENERAL REPORT, *supra* note 57, ¶ 74.

²³¹ XXVITH GENERAL REPORT, *supra* note 219, ¶¶ 48-50 and ¶¶ 771-81.

²³² For a general review of association agreements, see JACQUELINE D. MATTHEWS, ASSOCIATION SYSTEM OF THE EUROPEAN COMMUNITY (1989); Williams Rawlinson, *An Overview of EEC Trade with Non-Community Countries and the Law Governing Those External Agreements*, 13 FORDHAM INT'L L.J. 208 (1989-90).

cated pattern, although with significant variation as to establishment and investment rights and the rights of mobility for migrant workers. Notably, none of these agreements foresee the eventual admission into the Community of the state involved. Following the breakup of Yugoslavia, the Community denounced its 1983 association agreement. Its benefits were effectively maintained for most of the new states of the former Yugoslavia, but were suspended as to Serbia because of its support for the Serbian rebels in Bosnia-Herzegovina.²³³

After the Council of Foreign Ministers approved the use of association agreements for central and eastern Europe, the Commission issued a General Outline²³⁴ for such agreements, to be denominated Europe Agreements to mark "the importance of the political initiative which they represent."²³⁵ The Commission declared that states must, in effect, qualify for a Europe Agreement by "giving practical evidence of their commitment to the rule of law, respect for human rights, the establishment of multi-party systems, free and fair elections and economic liberalisation with a view to introducing market economies."²³⁶

The General Outline indicates six objectives for Europe Agreements. The most interesting are the first two, which are essentially political in nature. The Europe Agreements are intended to "help create a climate of confidence and stability favouring political and economic reform"²³⁷ — in other words, the Commission intends the agreements to reinforce the states' movement to democracy and free-market economic liberalism. The Europe Agreements then foresee a reward for the states involved. The second objective of the Agreements is to enable these states to participate in some appropriate manner in the benefits of the Community's single European market. The General Outline does not expressly promise ultimate Community membership, but does refer to the European Economic Area with the EFTA countries as a possible model for relations with eastern European states.

²³³ Council Decision 91/602, O.J. (L 325) 23 denounced the Yugoslav association agreement, while Council Regulation 91/3567, 1991 O.J. (L 342) 1 renewed the prior agreement's trade concessions as to Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia, but not as to Serbia.

²³⁴ XXIVTH GENERAL REPORT, *supra* note 157, ¶ 672. Extracts of the Commission's General Outline are reproduced in BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11 at 943-45. The full text appears in Agence Europe, Eur. Docts. No. 1646/47 (Sept. 7, 1990).

²³⁵ BERMANN, GOEBEL, DAVEY & FOX, *supra* note 11, at 943.

²³⁶ *Id.* at 943-44.

²³⁷ *Id.* at 944.

The next three objectives cited in the General Outline are economic in character: arrangements to promote trade and investment on a reciprocal basis; financial and technical assistance, including training of officials, management and technical personnel, in order to facilitate the states' transition to market-based economies; and, arrangements for multiannual financial support to assist the states to attain economic and monetary stability. The final objective is socio-cultural: to promote educational, informational, and cultural exchanges, especially among young people, to encourage a "shared sense of European identity."²³⁸

The Europe Agreements mark a new stage in Community-eastern European relations, advancing further than the "first generation" of relatively elementary trade agreements. Not only do the Europe Agreements share the general characteristics of association agreements noted above, but they have special features. Presumably, the reason for these features is that many of the Member States, in particular France, Germany, and Italy, traditionally have had strong ties with most of the central European states. These ties were forcibly interrupted by the period of Communist domination, and are now being re-established. The reference to the "shared sense of European identity" expresses the sense that the Community has a particular affinity with these states, as it also does with the EFTA states, more intense than with non-European states.

Although the commercial and economic importance of the Europe Agreements should not be underestimated, their political significance is their most striking feature. It is of capital importance to the Community that the principal central and eastern European states, especially those immediately adjacent, should not retrograde to authoritarian political institutions, whether of a right or left-wing nature. The Community is also concerned with the risk that these states will encounter such serious difficulties in the process of privatization and transition to a free market that the result will be monetary chaos, excessive inflation, massive unemployment, or other causes of social unrest. The Europe Agreements provide assistance to prevent against such real dangers. Moreover, the Agreements hold out the promise of even closer integration into the Community's single internal market, a promise intended to induce the states involved to accept the sacrifices necessary to move to firm democratic structures and free-market economies.

²³⁸ *Id.* at 945.

On December 16, 1991, Europe Agreements were signed simultaneously with Czechoslovakia, Hungary, and Poland.²³⁹ The Commission noted: "These agreements will enable those countries to take part in the process of European integration and will help them to progress toward their ultimate objective, which is to become full members of the Community."²⁴⁰ The European Parliament must give its assent to any association agreement.²⁴¹ Parliament acted favorably on the Europe Agreements with Hungary and Poland, but declined to act on that with the Czech and Slovak Republic in view of its impending dissolution.²⁴² In any event, none of the Europe Agreements has been finally ratified, so they are not yet in force.

Further Europe Agreements were signed in late 1992 with Romania and Bulgaria.²⁴³ As these agreements have only now begun to be reviewed by Parliament, ratification cannot be expected for some time.

Because it was anticipated that the process of parliamentary review and ratification of the Europe Agreements would be lengthy, the Community entered into Interim Trade Agreements in April 1992 with Czechoslovakia, Hungary, and Poland.²⁴⁴ These replace the earlier "first-generation" trade agreements with these states.²⁴⁵ Pursuant to the Interim Trade Agreements, more than half of these states' exports to the Community now enter free of duty.²⁴⁶ The principal exceptions are agricultural products, a sensitive political issue in view of the large Community surpluses, the difficult negotiations in the Uruguay Round of GATT on such products, and the Community's con-

²³⁹ XXVTH GENERAL REPORT, *supra* note 57, ¶¶ 835, 837 and 842. Because these Europe Agreements have not yet been ratified, their texts have not been officially published. The unofficial texts are available from the Commission Information Service. The annexes, however, are not yet complete. See George Bustin, Michael Sussman, Lucyna Tokarczyk & Juraj Strasser, *EC Association Agreements: Time to Renegotiate*, 10 INT'L FIN. L. REV. 26 (Oct. 1992) (providing a short summary of the Europe Agreements' provisions).

²⁴⁰ XXVTH GENERAL REPORT, *supra* note 57, ¶ 810. The Preamble of the Europe Agreements with Czechoslovakia, Hungary and Poland each referred to that state's objective of Community membership.

²⁴¹ SEA, *supra* note 6, amending EEC TREATY, *supra* note 1, art. 238.

²⁴² XXVITH GENERAL REPORT, *supra* note 219, ¶ 746. Presumably separate new Europe Agreements will have to be negotiated with the Czech Republic and with Slovakia.

²⁴³ *Id.*

²⁴⁴ Council Decision 92/228, 1992 O.J. (L 114) 1 (Republic of Poland); Council Decision 92/229, 1992 O.J. (L 115) 1 (Czech and Slovak Republic); Council Decision 92/230, 1992 O.J. (L 116) 1 (Republic of Hungary).

²⁴⁵ *Supra* note 217.

²⁴⁶ XXVITH GENERAL REPORT, *supra* note 219, ¶ 749.

cern that opposition by farmers might jeopardize ratification of the Maastricht Treaty.

Textiles, coal, and steel are other products where the Community is reluctant to lower tariffs or remove quotas because of its own surplus production, as well as excess production on the world markets. The Community's desire to control the level of imports of these products from eastern Europe is augmented by its concern for the severe unemployment and social unrest in the former East Germany, which is likewise a substantial producer of such products. Protocols and annexes will require the Community to reduce and ultimately eliminate its tariffs and quotas on almost all textiles, coal, iron, and steel products over a six-year period.

Turning from trade issues to the important topic of the rights of establishment and investment, the Europe Agreements are a dramatic step toward the integration of eastern European states into the Community's single market. The Community is obligated to grant national treatment (i.e., an elimination of any discrimination based on nationality) to the nationals and enterprises of the east European signatory states, which means that they will have easy access to the Community. On the other hand, rights of establishment of Community nationals and enterprises in the eastern European states will be phased in over five to ten years, a precaution intended to reduce the risk that their economic sectors will be taken over by much stronger Community entities. Ten year phase-in terms are specifically provided for the sectors of financial services and natural resources.

The Europe Agreements do not provide for free movement of workers. The Community certainly did not want to open its borders to migrant workers from eastern Europe, due to the Community's own high unemployment rate and the fear that a flood of unemployed workers from the east would exacerbate the problem. (In fact, there is growing concern that thousands of East European workers have become illegal immigrants in the Community.) However, the Europe Agreements do provide that Community Member States must not alter unfavorably the status of eastern European workers already legally present in the Community.

Another important feature of the Europe Agreements is the requirement that the eastern European signatory states adopt legislation embodying the essential elements of the Community rules on competition under EEC Treaty Articles 85 and 86. For the Community this was imperative, because in the absence of such rules the marxist state monopolies could be succeeded by monopolies, price-fixing cartels,

and other restrictive practices in the private sector. The process of adopting implementing legislation and creating regulatory authorities has begun in Hungary and Poland, but the necessary education of public and private sector economic operators, with regard to the obligations of competitive behavior, will be slow.

Looking toward the eventual possible admission of the east European signatory states into the Community, these states are required to harmonize their legislation with the Community insofar as possible. The importance of this obligation cannot be over-estimated. Due to its active harmonization of laws program in the 1970s and 1980s, augmented by the recent wave of legislation intended to achieve the internal market by 1992, the Community has hundreds of major directives that must be implemented into national legislation. Consequently, as the signatory states replace their marxist rules with new free-market legislation, in such fields as banking, company law, securities law, insurance, intellectual property, environmental protection, consumer rights, employee relations, etc., they will be looking to the Community model.

C. Medium Term Prospects: The EEA as a Model

Viewing the future optimistically, at some point later in this decade, the Europe Agreements with Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, and perhaps other states will have been largely implemented to the satisfaction of all parties.²⁴⁷ All of the signatory states will have attained firmly-established democratic regimes and have largely transformed their economies into free market systems, including the controls provided by a nascent competition law.

Several, and perhaps most, of the central and eastern European states that have implemented their Europe Agreements will be both ready and desirous to move to greater integration with the European Community. Although some of these states may prefer full membership, there is a strong likelihood that the Community will instead opt

²⁴⁷ Although this is pure speculation on the part of the author, it is possible that no further Europe Agreements will be entered into, at least not for several years. It seems unlikely that the protracted conflict in the former Yugoslavia will permit any of the new republics there to enter into Europe Agreements. Albania's economic condition and its democratic credentials are sufficiently doubtful to make it an unlikely candidate for a Europe Agreement. Relations with Russia and the other states of the CIS are likely to be limited to trade agreements. Only the Baltic states may perhaps aspire to Europe Agreements in the near term.

to transform relations into a form similar to the proposed EEA.²⁴⁸ Indeed, it may even turn out that certain eastern European states will join in the European Economic Area together with those EEA states that have not by that time become Community Member States. It is therefore appropriate at this point to describe the contours of the EEA as a possible model for the next stage of Community-eastern European relations.

The European Economic Area is the latest stage in relations between the European Community and the countries bound together in EFTA, namely Austria, Finland, Iceland, Norway, Sweden, Switzerland, and Liechtenstein (linked to Switzerland by an economic and customs union). The EFTA agreement,²⁴⁹ sometimes called the Stockholm Convention, was signed in 1960 in order to form a free trade bloc that might serve as a counter-balance to the then young European Economic Community. Although EFTA has neither aspired to, nor achieved the sort of supranational structure of the Community, EFTA did attain a substantial level of trade liberalization among its members by the end of the 1970s, including the abolition of all duties and quotas on industrial products.

In 1973, when Denmark and the United Kingdom left EFTA to join the European Community, the Community entered into virtually identical favorable trade agreements with all of the EFTA states, resulting in free trade in industrial products since 1984.²⁵⁰ Then, on April 9, 1984, a joint ministerial conference of the Community and EFTA states adopted the Luxembourg Declaration, calling for increased cooperation, annual ministerial meetings, and movement toward the creation of "a dynamic European economic space."²⁵¹

After the Community adopted the goal of achieving an integrated internal market by December 31, 1992,²⁵² the EFTA countries naturally desired to participate in some fashion in the benefits of such a market. The concept of such participation, originally called the

²⁴⁸ Remember the express Commission reference to this possibility in the General Outline policy statement discussed *supra* note 237 and accompanying text.

²⁴⁹ The current text of the EFTA Agreement is contained in EFTA SECRETARIAT, *THE EUROPEAN FREE TRADE ASSOCIATION* 118 (3d ed. 1987). Denmark, Portugal, and the United Kingdom originally joined EFTA in 1960, but later left to become Community Member States.

²⁵⁰ For a description of Community-EFTA relations before the EEA, see E.P.N. Gardener, *The European Free Trade Association and the European Community*, 25 INT'L LAW. 187 (1991).

²⁵¹ E.C. Bull. 1984/4, at 9-10.

²⁵² SEA, *supra* note 6, art. 8a. See *supra* notes 46-47 and accompanying text.

"European Economic Space," was later termed the "European Economic Area." Negotiations between the Community and the EFTA states were long and arduous, throughout all of 1990 and 1991, with particularly sensitive issues arising as to the maritime industry, fishing rights, environmental protection (including the well-publicized Swiss opposition to further trans-alpine highways), application of competition rules, free movement of workers, and the institutional framework of the new structure.²⁵³

The initial draft EEA Agreement was submitted by the Commission to the Court of Justice for prior review pursuant to Article 228 of the EEC Treaty.²⁵⁴ The Court's famous Opinion on the European Economic Area,²⁵⁵ discussed in Part I above with regard to the Court's description of the constitutional dimensions of the Community, required modifications of the EEA Agreement to eliminate a proposed court structure in the EEA framework. Following the Court's approval of this modification,²⁵⁶ the EEA Agreement was signed in Oporto, Portugal on May 2, 1992.²⁵⁷

On October 29, 1992, the European Parliament gave its assent, required by EEC Treaty Article 238, to the EEA Agreement.²⁵⁸ The EEA Agreement is presently in the process of ratification by all the Community and EFTA states. The parties intended the new structure to commence on January 1, 1993, but this is no longer possible because Switzerland, by a fifty-one percent majority adverse vote in a referendum, rejected the EEA Agreement.²⁵⁹ Negotiations are cur-

²⁵³ XXIVTH GENERAL REPORT, *supra* note 157, at ¶ 608; XXVTH GENERAL REPORT, *supra* note 57, ¶ 846-52.

²⁵⁴ The Council, Commission, or any Member State may request the Court to review the compatibility with the EEC Treaty of a proposed international agreement and the Court's opinion is then binding.

²⁵⁵ Opinion 1/91, *supra* note 43 and accompanying text. See Noreen Burrows, *The Risks of Widening Without Deepening*, 17 EUR. L. REV. 352 (1992).

²⁵⁶ Opinion 1/92, 1992 E.C.R. — (not yet reported) (Apr. 10, 1992), 2 C.M.L.R. 217 (1992).

²⁵⁷ XXVITH GENERAL REPORT, *supra* note 219, ¶ 789, which also briefly summarizes the EEA Agreement provisions. The text of the EEA Agreement has not yet been officially published, but is available from the Commission Information Service. The text with all its annexes is voluminous. The Common Market Law Review has published the principal text and protocols in *The EEA Treaty: Main Agreement and Selected Protocols*, 29 COMMON MKT. L. REV. 1247 (1992). See also Commission proposal for a Council regulation to implement aspects of the EEA Agreement, 1992 O.J. (C 339) 11.

²⁵⁸ XXVITH GENERAL REPORT, *supra* note 219, ¶ 789.

²⁵⁹ *Id.* The narrow Swiss majority against ratification came despite a vigorous campaign in favor waged by the Government, business, and financial leaders. The principal opposition came in German-speaking cantons, which appeared to be strongly influenced by fears of floods

rently underway between the Community, Switzerland, and the other EFTA states to determine how to modify the EEA Agreement to have it go into effect without Switzerland. The principal difficulties lie not only in determining the relation of Switzerland to the EEA structure, but also the increased amount of monetary contributions by the other EFTA states to the cohesion fund to replace that scheduled for Switzerland.²⁶⁰

The level of economic integration between the Community and EFTA states that would be produced by the EEA Agreement,²⁶¹ represents a quantum leap forward from the present stage of trade relations among those states, as well as in comparison with the close relations attained between the Community and the signatory eastern European states under the Europe Agreements. Arguably, the EEA Agreement comes close to making the EFTA states non-voting members of the Community. Indeed, the obligation imposed on the EFTA states to align their legislation with the Community's would seem to be an acceptable burden only in view of the fact that most of the EFTA states (Austria, Finland, Norway, Sweden, and Switzerland) are applicants for Community membership.

Attaining a single integrated internal market means the elimination of barriers to the free movement of goods, workers, services, and capital, with the concomitant right of establishment. With limited exceptions, the EEA Agreement obligates the Community and the EFTA states to remove such barriers among themselves.²⁶² Moreover, the internal market program of the Community comprises important legislation in the areas of consumer rights, environmental

of immigrants and the harm foreseen to Swiss grass-roots democracy. Alan Riding, *Swiss Reject Tie to Wider Europe*, N.Y. TIMES, Dec. 7, 1992, at A7.

²⁶⁰ See *infra* note 267 and accompanying text.

²⁶¹ Two excellent articles on the EEA Agreement have now appeared. See Sven Norberg, *The Agreement on a European Economic Area*, 29 COMMON MKT. L. REV. 1171 (1992); Armando Toledano Laredo, *The EEA Agreement: An Overall View*, 29 COMMON MKT. L. REV. 1199 (1992).

²⁶² Limited barriers to the free movement of goods will continue for certain agricultural products and for fisheries, in view of the sensitive nature of these for both the Community and several EFTA states. Accepting the free movement of workers proved difficult for Switzerland, which insisted on a five-year period to phase in the application of the right. (Note that popular opposition to the free movement of workers proved to be one of the principal factors in the negative vote in the Swiss referendum.) The freedom of establishment, right to provide services, and free movement of capital occasioned EEA Agreement provisions which essentially parallel those in the EEC Treaty. Thus, the notable recent Community achievements in the harmonization of company law, securities, banking, and insurance law will generally be extended to the EFTA states, as will the beneficial effects for free movement of the professionals attained through the principle of mutual recognition of their higher education diplomas.

protection, and social policy (employee rights), which the EFTA states are also generally obligated to adopt.²⁶³ Finally, the EFTA states must adopt a system of competition rules, together with administrative and judicial enforcement of those rules, which essentially parallels the Community competition law.²⁶⁴ It is accordingly not surprising that the EEA Agreement annexes a list of a total of 1500 Community legal measures that EFTA states are obligated to introduce as legislation or regulations in their own legal systems.

The EEA Agreement thus represents a program for legislative action by the EFTA states even more ambitious than that assumed by the Community in 1987 when it committed itself to attaining a completed internal market by the end of 1992. This is because the Community had already in place a substantial body of harmonized legislation in 1987 to serve as the starting point, while the EFTA countries must in large measure begin the process (unless, like Austria, they have opted in recent years to adapt their legislation to conform with Community directives). As Sven Norberg, the Director for Legal Affairs of the EFTA Secretariat, has well said, at the end of the process there will essentially be "a common European legal system."²⁶⁵

The institutional structure to be created by the EEA Agreement, principally for the EFTA states,²⁶⁶ is not of direct concern in the present review. It is worth noting, however, that the EFTA states are to contribute substantial amounts to a Community cohesion fund, which is intended to help lesser-developed regions of the Community to confront the challenge posed by the greater competitive pressures of a completed internal market.²⁶⁷ Because the EFTA states are, generally speaking, well-advanced industrial and commercial economies, these contributions were required to balance the benefits they would receive through the integration of their economies into the Community market. Unfortunately, Switzerland's rejection of the EEA Agreement means that it will not contribute to the cohesion fund. The shortfall is

²⁶³ The EFTA states will however be allowed to adopt higher levels of protection in the environmental field than are mandated by Community legislation. This is not surprising, given the Scandinavian countries' traditional concern for the environment.

²⁶⁴ The complex system of administrative and judicial review, especially for competition law matters which principally concern the EFTA states, as modified after the Court of Justice's initial opinion, *supra* note 251, is described in Norberg, *supra* note 261, at 1187-94.

²⁶⁵ Norberg, *supra* note 261, at 1172.

²⁶⁶ See Toledano Laredo, *supra* note 261, at 1208-13.

²⁶⁷ XXVITH GENERAL REPORT, *supra* note 219, ¶ 789.

substantial and it is unclear to what extent, if at all, the other EFTA states will be required to increase their contributions.

The European Economic Area, although a much higher stage of integration than mere trade agreements, or even the Europe Agreements, is itself seen by most EFTA states as a stepping-stone to full Community membership. If this should occur, only one or two EFTA states may remain in the EEA by the end of this decade. In that event, some of the eastern European states that have satisfactorily implemented their Europe Agreements may perhaps join with the surviving EFTA states in a reconstituted European Economic Area.

Indeed, by the late 1990s, the central and eastern European states may fall into four categories: those that remain at the level of the present trade agreements, those that are signatories of Europe Agreements, those that join in the EEA or some structural equivalent, and those that seek full membership in the Community. The next section reviews the process of application for membership and the possible consequences for applicant states and for the Community.

D *Possible Accession of New Member States*

Article 237 of the EEC Treaty governs the admission, or, as it is more commonly called, the accession of new states to the Community.²⁶⁸ The procedure set out in Article 237 requires the Commission to give an initial opinion on the candidate state's suitability for membership, as well as the political, economic, and social issues involved in its becoming a member. If the Commission's opinion is favorable, the Community then negotiates with the applicant the terms of admission. These terms are incorporated into a treaty of accession, which must be unanimously approved by the Council. Since the Single European Act's entry into force, the European Parliament must likewise give its assent to any applicant. Finally, because every accession necessitates amendments to the Community treaty structure, all the Member States and the applicant must ratify the treaty of accession.

At the time of the admission of Denmark, Ireland, and the United Kingdom in 1973, the principle of the "*acquis communautaire*" was firmly established.²⁶⁹ This principle requires any

²⁶⁸ Admission to the Coal and Steel Community is governed by the ESCS TREATY, *supra* note 1, art. 98, and to Euratom by the EURATOM TREATY, *supra* note 1, art. 205. The procedures set forth in each article are parallel to those under EEC Treaty Art. 237, except that the SEA, *supra* note 6, did not amend these provisions to require the assent of Parliament, even though it did so in EEC Treaty art. 237. EEC TREATY, *supra* note 1, art. 237.

²⁶⁹ The December 1-2, 1969 Hague summit meeting of the heads of state of the original six

applicant to accept all aspects of the Community institutional structure, legislation, and Court of Justice doctrines as they exist at the time of admission. Any modifications, in particular, provisions for the phasing in of Treaty rights and obligations or legislation as applied to the applicant, must be expressly set forth in the treaty of accession.²⁷⁰

This approach has two consequences. First, the period of review and negotiations has become increasingly lengthy as the Community has grown in complexity. Thus, the negotiations for the treaty of accession for Greece took three years, and those for Portugal and Spain each took over six years. Second, the treaties of accession are extremely long and detailed, and they invariably fix long periods of transition to phase in the application to the new Member States of various Treaty rights, obligations, or Community rules in particular sectors.²⁷¹ These transitional periods in the Greek, Portuguese, and Spanish treaties were set for as long as five to ten years for such sensitive areas as the free movement of workers or of capital, the entry into force of all aspects of the CAP, and the grant of free fishing rights in each other's territorial waters.²⁷²

Because the Community is now completing its internal market integration, Community rules have grown substantially more voluminous and complex since Portugal and Spain entered. Applicant states are faced with an even greater task of aligning their internal legislation to the rules of the Community. However, the EFTA states that ratify the European Economic Area Agreement and commence applying its provisions, which already obligate them to modify their internal laws to adopt most of the present Community rules, will obviously find it both easier to negotiate treaties of accession and easier to com-

Member States authorized the start of negotiations for accession with Denmark, Ireland, and the United Kingdom, but stipulated that the applicants must accept the principle of the "*acquis communautaire*."

²⁷⁰ See Case 203/86, *Spain v. Council*, 1988 E.C.R. 4563, in which the Court of Justice held that Spain could not claim any exception to the rules laid down in the CAP unless they were expressly granted in the Spanish accession treaty, and that Spain's expectation that certain rules favorable to its dairy interests would be maintained did not prevent the Council from taking legislative action to modify those rules.

²⁷¹ Greece applied on June 15, 1975. Negotiations lasted from July 1976 to April 1979, and Greece joined the Community on January 1, 1981. Portugal applied on March 28, 1977 and negotiations occurred from October 1978 to March 1985, while Spain applied July 28, 1977 and negotiations took from February 1979 to March 1985. Portugal and Spain entered the Community together on January 1, 1986.

²⁷² E.C. Bull. 1979/5, at 9-16 summarizes the essential terms of the Greek treaty of accession, while E.C. Bull. 1985/3, at 7-9 does so for the Portuguese and Spanish treaties.

ply with the requirements set in any transitional periods. To a lesser extent, central and eastern European states may find eventual Community accession facilitated, because the Europe Agreements motivate them to follow, insofar as possible, the Community rules in many sectors.

By the end of 1992, eight states had applied for admission to the Community: Austria, Finland, Norway, Sweden, and Switzerland from among the EFTA states, and Cyprus, Malta, and Turkey. In accordance with its duty to review applicants under EEC Treaty, the Commission has provided favorable opinions with regard to Austria,²⁷³ Finland,²⁷⁴ and Sweden.²⁷⁵ The Commission has not yet provided an opinion concerning Norway's application, submitted only on November 25, 1992,²⁷⁶ but this is likely to be also favorable.²⁷⁷ In view of the Swiss referendum's rejection of the EEA Agreement, Switzerland cannot at present be seriously considered a candidate for admission to the Community. For various reasons, Cyprus, Malta, and Turkey are unlikely to be serious candidates, at least in the near term.²⁷⁸

Although the applications of several states have been pending for some time, the Community has preferred to begin negotiations with new candidates only after the fate of the Maastricht Treaty has been determined. In popular parlance, the Community view has been that

²⁷³ E.C. Bull. 1991/7-8, at 80-81; XXVTH GENERAL REPORT, *supra* note 57, ¶ 848.

²⁷⁴ E.C. Bull. 1992/11, at 1.4.1; XXVITH GENERAL REPORT, *supra* note 219, ¶ 742.

²⁷⁵ E.C. Bull. 1992/7-8, at 74; XXVITH GENERAL REPORT, *supra* note 219, ¶ 742.

²⁷⁶ E.C. Bull. 1992/11, at 1.4.3; XXVITH GENERAL REPORT, *supra* note 219, ¶ 797. Norway's decision to apply came after months of bitter internal debate, with the farming and fishing interests tending to be opposed. See *Norway Facing Stormy Debate Over Membership in the Community*, EUROWATCH (Buraff. Pub.), Feb. 24, 1992, at 6-7.

²⁷⁷ It is highly unlikely that the Commission would issue an unfavorable opinion concerning an EFTA state that has ratified the EEA Agreement. It is interesting, however, to note that Norway itself might ultimately decide against Community membership, especially if a referendum on the subject is held. Norway had initially applied in 1970 and had been accepted along with Denmark, Ireland, and the United Kingdom, but a narrowly-adverse vote in a referendum in 1972 prevented Norway from joining the Community. It would be ironic if history should repeat itself, but the Norwegian people today are still sharply divided on whether or not to join.

²⁷⁸ The Commission has not as yet issued opinions on Cyprus and Malta, and those negotiations continue. XXVITH GENERAL REPORT, *supra* note 219, ¶ 34-37. However, the political partition of Cyprus between Greek and Turkish governments, and Malta's small economy and population make favorable Commission opinions unlikely. In response to Turkey's 1987 application, the Commission, in 1989, concluded that Turkey could not presently fulfill Member State obligations. XXIIIRD GENERAL REPORT, *supra* note 217, ¶ 801. See also Paul Lansing and Paul Bye, *New Membership and the Future of the European Community*, 15 J. WORLD COMPETITION L. REV. 59, 69-72 (1992).

"deepening" of the Community should precede its "widening." The Maastricht European Council of December 1991 did however ask the Commission to study the implications of the accession of new states.

The Commission's report, *Europe and the Challenge of Enlargement*,²⁷⁹ was submitted to the June 1992 Lisbon European Council. This Commission report considers not only the states that had formally applied, but also states that could be reasonably expected to apply, including, conceivably, central or eastern European states. The Commission report emphasizes two prerequisites for admission: the applicant states' adherence to democratic principles of government as articulated by the European Council in its Copenhagen Declaration of Democracy,²⁸⁰ and their willingness and ability to accept the "*acquis communautaire*."²⁸¹ The report makes clear that an applicant state must also possess "a functioning and competitive market economy and an adequate legal and administrative framework."²⁸² Eastern European states probably have some way to go before they satisfy this latter condition.

The December 1992 Edinburgh European Council favored the opening of negotiations with Austria, Finland, and Sweden early in 1993, and with Norway as soon as the Commission provided its report.²⁸³ Informal contacts are expected to begin even before Denmark and the United Kingdom ratify the Maastricht Treaty in the late spring, with formal negotiations starting after their ratification. The fate of such negotiations is uncertain, if, contrary to expectation, either Denmark or the United Kingdom should not ratify the Maastricht Treaty.

Looking at the future with an optimistic point of view, negotiations with Austria, Finland, Norway, and Sweden could go swiftly, because they are all solidly democratic and advanced economic societies, and they are all prospective members of the European Economic Area. Negotiations might even be concluded in 1994, with membership coming as soon as 1995 or 1996.

Some difficult issues must be confronted. The institutional structure of the Community will have to be significantly modified to accommodate four new states. It will have to be decided how many votes each would have in the Council and how many members in Par-

²⁷⁹ E.C. Bull. 1992/3 Supp.; see also XXVITH GENERAL REPORT, *supra* note 219, ¶ 739.

²⁸⁰ *Supra* note 134.

²⁸¹ XXVITH GENERAL REPORT, *supra* note 219, ¶ 739.

²⁸² *Id.*

²⁸³ *Id.* ¶ 743.

liament. More importantly, the functional efficiency of enlarged institutional bodies will have to be considered. The Court of Justice could probably operate quite well with four more judges and another Advocate General or two—indeed, more personnel might lighten its load. The Parliament could arguably handle an additional one hundred or so members and function efficiently, given its use of committees.

The structure of the Commission is much more problematic. How large can it become and still operate efficiently as a collective body? To many observers, the Commission should remain a relatively small body. The Maastricht European Council left the issue of the future number of Commissioners open, and a Declaration annexed to the TEU calls for a review of the question at a later date.²⁸⁴ If new states are to be admitted, the five larger states may have to give up their second Commissioner, and some system of rotation of Commissioners among smaller states may have to be adopted.

As for the Council, the difficult issue will be not only the number of weighted votes to be given to the four applicants, but also the mode of calculation of the qualified majority in voting. Will the Member States, especially the larger ones, be willing to accept the adoption of measures even when four, five or more states are in the minority? This is seemingly the only efficacious solution, but its adoption poses obvious political and psychological issues.

Another issue is the number of official languages. Should it be increased, to include Finnish, Norwegian, and Swedish? Can the Member States at long last agree to limit the number of working languages used in preparing draft proposals, reports, and secondary materials, or in conducting meetings and conferences? If so, should the working languages be limited to English and French or should they include German, Italian, or Spanish? Cultural pride will make this an issue difficult to resolve.

Once the Maastricht Treaty is ratified, yet another major issue will arise. The Maastricht Treaty provides that EEC Article 237 will be repealed and replaced by TEU Article O. Article O sets forth the same procedural steps in the process of application as does Article 237, but the end result is changed. The applicant state is admitted to the European Union, which includes the European Community and the EMU, the common foreign and security policy, cooperation in justice and home affairs, and the concept of European citizenship.

²⁸⁴ TEU, *supra* note 2, Declaration on the Number of Members of the Commission and of the European Parliament.

Will the applicants, especially the Scandinavians, be willing to join not only the Community, but also the broader structure of the Union?

This issue becomes all the more acute in view of the concessions made to Denmark by the European Council on December 11-12, 1992 in Edinburgh. Denmark would be allowed to remain outside of aspects of the EMU, notably the third stage of the EMU and the single European currency, and need not participate in aspects of the common foreign policy, notably common defense measures.²⁸⁵ If, as is hoped, these concessions induce the Danes to ratify the Maastricht Treaty, then Denmark will join the United Kingdom in remaining outside of the EMU's most important aspects and will have its own rights to opt out of significant developments in the common foreign policy.

Finland and Sweden, traditionally neutralists in foreign policy, may seek similar concessions. All three Scandinavian states may be reluctant to participate in the second or third stages of the EMU. However, most Member States are bound to resist such concessions to the applicant states. After all, the more states remaining outside of certain Union fields of action, the less successful such action is apt to be. It is impossible to predict how this issue might be resolved.

In view of all the difficulties involved in the admission of Austria, Finland, Norway, and Sweden, the admission of eastern and central European states to the European Union and the European Community becomes speculative. Nonetheless, such speculation is obviously of great interest.

Let us hypothesize that in five years conditions in several central and eastern European states have evolved quite favorably. The Czech Republic, Hungary, Poland, and perhaps other states have developed stable democratic regimes and functional free-market economies. They have also satisfactorily implemented the provisions of the European Agreements, including the development of a serious set of competition rules, the imitation of the Community's regulation of commercial and financial transactions, and the creation of intellectual property rights identical to those in the Community.

The European Community, or the European Union, as it then may be called, may perhaps respond favorably by opening negotiations with the most advanced eastern states by the end of this century.

²⁸⁵ XXVITH GENERAL REPORT, *supra* note 219, ¶ 11. The full text of the European Council's declaration concerning Denmark is expected to be published in E.C. Bull. 1992/12 and is presently available from the Commission Information Service.

However, such negotiations are bound to be difficult, raising serious political and structural issues for both the Community and the applicant east European states. Each successive enlargement by several new states exacerbates the institutional efficiency problems discussed above. While one can certainly envision a Community of twenty or more states by the start of the next century, it is difficult to imagine precisely what structure it might have.

One may speculate that the more states composing the European Community, the greater the prospects for a looser federal structure, rather than one dominated by central authorities. This is even more apt to occur because the Scandinavian and eastern European states represent political, social, and cultural traditions less homogeneous than those of the original continental members of the Community.

A scenario in which the Czech Republic, Hungary, Poland, and perhaps other eastern European states join the Community by the end of this decade is an optimistic one. It is equally possible that high inflation rates, monetary instability, governmental deficits, high unemployment, or other economic or social problems may so hobble even the most advanced eastern states that they will be unable to present a serious case for Community membership even in a medium-term future.

In that event, the European Community will be presented with a different but equally serious challenge. The Community must continue to provide economic support through the EBRD and the Phare program, and beneficial trade concessions and technical assistance through the Europe Agreements, for at least the rest of this decade. In addition, the Community must evolve a suitable form of more intimate political relations with eastern Europe.

The Commission in its report, *Europe and the Challenge of Enlargement*, suggested the possibility that certain eastern European states should be granted a form of associate status in various projects of the Community.²⁸⁶ The Commission returned to this concept in another report, this time to the Edinburgh European Council.²⁸⁷

The report recommends that the various opportunities for political contact under the Europe Agreements should be intensively exploited. It suggests that the Community should go further in

²⁸⁶ *Supra* note 279.

²⁸⁷ Towards a Closer Association with the Countries of Central and Eastern Europe, SEC(92)2301 final. The report is dated December 2, 1992 and is available from the Commission Information Service.

developing a "structured institutional relationship with partner countries" in eastern Europe in sectors such as energy, the environment, transport, telecommunications, science, and research.²⁸⁸ It even recommends that sessions of the Council dealing with such matters should be attended by ministerial representatives of partner states, with a voice but no vote.²⁸⁹ Such an approach could alleviate the concern of eastern Europeans that their unfortunate past and their present economic problems relegate them permanently to a sort of second-class European status, on the outside of the Community looking in.

To end this section on a optimistic note, one can certainly hope that several eastern European states, and particularly the Czech Republic, Hungary, and Poland, will enjoy the political leadership, the economic capacity, and the good fortune to progress to a level that would merit their acceptance as members of the European Community, before the end of this decade. As Members, they, along with the Scandinavian states, could provide their own unique contributions to the federal or supranational structure that is now called the European Community but may soon be appropriately termed the European Union.

The Commission in its report to the Edinburgh Council referred to the aspiration of eastern European states to become members of the Community and urged the European Council to accept this as a goal, without modifying the conditions for accession.²⁹⁰ The Commission prudently noted that no timetable could be set and that periods of transition would be required.²⁹¹ Without making a commitment to the goal of eastern European state membership, the Edinburgh European Council did call on the Council to consider the issues raised by the Commission and placed the topic on the agenda for the spring European Council meeting.²⁹²

Thus, although not even the near term future of the Community and eastern Europe is foreseeable, serious grounds for hope exist that

²⁸⁸ *Id.* at 8.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 2-3.

²⁹¹ *Id.* at 3.

²⁹² Conclusions of the Presidency, European Council in Edinburgh, 11-12 December 1992, Part D, External Relations, points 7-9. The conclusions have not yet been published in the EC Bulletin. The spring Council meeting will be held in Copenhagen under the Danish presidency.

the end of this decade will witness a new enlargement of the Community and the addition of a number of eastern European states.

CONCLUSION

This article has attempted to fulfill a double purpose. First, it has tried to present in relatively clear fashion the fundamental federal, or supranational, characteristics of the Community, initially as seen through the Court of Justice's constitutional doctrines, and then through a careful outline of the Community's present scope and institutional structure. The article then has attempted to show the degree to which the Maastricht Treaty is intended to reinforce those federal, or supranational, characteristics.

In this presentation, the intent has been to show that the Community does indeed represent a novel and a successful new form of federalism, an "integrative federalism" to use Professor Lenaert's apt phrase. The Community's success lies in its constantly increasing transfer of sovereignty (principally in the economic sector, but also in political and social fields) to a relatively efficient although certainly unusual central structure. Although this transfer of sovereignty is now well advanced, due to the success of the Single European Act and the 1992 internal market program, nonetheless the Member States have retained their national identities and been able to prosper in their collaborative efforts.

The impact of the Maastricht Treaty remains to be seen. Many of its provisions, especially those providing for an economic and monetary union, now appear rather visionary. Still, once ratified, implementation of its provisions in the medium-term future may well bring added force to the federalist character of the Community, without unduly sacrificing national identity. If the Maastricht Treaty does succeed in developing a sense of European citizenship, it will have achieved a great deal.

The second purpose of this article was to relate this "deepening" of the Community to its "widening." The most immediate form of "widening" is the creation of the European Economic Area, with the prospect in the medium-term that several EFTA states will then move on to full Community membership.

But "widening" will also include the Community's growing process of integration with east and central European states, the principal concern of the current Symposium. The article has accordingly tried to describe the evolution in relations between the Community and

eastern Europe, moving from trade and aid relations to the new plateau of the Europe Agreements. The ultimate prospect of full membership for some eastern states must presently be assessed as visionary, but a vision not without the realm of practical attainment.

It would seem appropriate to close by quoting Sir Leon Brittan, the Commissioner currently charged with external relations:

Is the Community merely paying lip-service to the need to help our Eastern neighbours, or is the commitment real? I am sure that the commitment is a genuine one. The prospect of fully returning the countries of Eastern and Central Europe to the family of European nations has captured the imagination of millions of ordinary citizens in the Community, particularly the young. A real commitment to bring this about is bound to involve making difficult choices. It is my firm view that the Community must find ways of meeting this challenge.²⁹³

²⁹³ Commission Press Rel. IP(93)35 (Jan. 21, 1993), *cited in* 1 [New Development] Common Mkt. Rep. (CCH) ¶ 96713 (1993).

